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No. 08-948

In The Supreme Court of the United States

HENRY JOSEPH ANDERSON
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Louisiana law provides that after the jury finds that an aggravating circumstance exists, "[a] sentence of death shall not be imposed unless the jury . . . after consideration of any mitigating circumstances, determines that the sentence of death should be imposed." La. Code Crim. Proc. art. 905.3. In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), this Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt." The Louisiana Supreme Court rejected petitioner's claim that *Apprendi* applies to the culpability determination, holding instead that jurors need not employ any standard for determining which defendants convicted of first-degree murder and an aggravating circumstance are culpable enough to receive a death verdict.

This gives rise to the following constitutional question: Whether the jury's determination that death should be imposed must be made beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

The petitioner is Henry Joseph Anderson, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Joseph Anderson respectfully petitions for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

OPINION BELOW

The Louisiana Supreme Court's opinion, in *State v. Anderson,* authored by Justice Johnson, is reported at __ So. 2d __, 2008 La. Lexis 1744, and is reprinted in the Appendix at Pet. App. A. 1a-102a. The rehearing denial is reprinted in the Appendix at Pet. App. B. 103a.

JURISDICTION

The Louisiana Supreme Court's opinion was entered on September 9, 2008. That court denied Mr. Anderson's timely petition for rehearing on October 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentmen or indictment of a Grand

> Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury[.]

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Article 905.3 of the Louisiana Code of Criminal Procedure provides, in pertinent part:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines

> that the sentence of death should be imposed.
> ...

Article 905.6 of the Louisiana Code of Criminal Procedure provides, in pertinent part:

> A sentence of death shall be imposed only upon a unanimous determination of the jury. . . .

Article 905.8 of the Louisiana Code of Criminal Procedure provides:

> The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

STATEMENT

The Louisiana legislature drafted a capital sentencing statute that renders life without the possibility of parole the maximum punishment available for first-degree murder (even after the jury's finding that an aggravating circumstance exists) unless a jury, after considering any mitigating evidence, unanimously determines that death should be imposed.[1]

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[1] In addition to the jury's assessment of any mitigating evidence, La. Code Crim. Proc. art. 905.2 requires the jury to consider: the "circumstances of the offense, the character and propensities of the offender, and the victim, and the impact

While this Court clarified in *Ring v. Arizona*, 536 U.S. 584 (2002), that the *Apprendi* rule[2] applies to the finding that a statutory aggravating circumstance exists, *Ring* explicitly left unanswered the question of *Apprendi's* applicability to other capital sentencing determinations. *Id.* at 597 n.4.[3] This case presents an opportunity to address whether the Constitution requires the Louisiana statute's second determination (which encompasses

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that the crime has had on the victim, family members, friends, and associates . . ." before deciding whether death should be imposed. Moreover, regardless of its culpability determination, or its consideration of the 905.2 sentencing factors, the jury is never required to return a death sentence. *See, e.g., State v. Lucky*, 755 So. 2d 845, 861 (La. 1999) ("[W]hile a jury is never obliged to impose a death sentence, there is no general requirement to so charge"); *id.* citing *State v. Watson*, 449 So. 2d 1321, 1331-32 (La. 1984) (sanctioning an instruction that jurors may return a life sentence as a gratuitous act of mercy).

[2] *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (holding that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).

[3] *See also Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (finding that "Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements," but noting as "significant" that under the Kansas scheme the state carries the burden of persuasion, beyond a reasonable doubt, on the question of death-worthiness).

consideration of any mitigating evidence) to be made beyond a reasonable doubt.[4]

The district court did not require petitioner's sentencing phase jury to conclude beyond a reasonable doubt that, after considering any mitigating evidence, death should be imposed. In fact, the district court provided no guidance at all to petitioner's jury regarding how it was to consider the impact of any mitigating evidence before determining that Anderson should be sentenced to death. Nonetheless, the Louisiana Supreme Court affirmed Anderson's death sentence, holding that "neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt." Pet. App. at 89a.

Over the last six years, fourteen other state courts of last resort and four federal courts of appeals have wrestled with whether and how *Apprendi* and *Ring* affect the portions of their capital sentencing schemes that subsume the determination whether any mitigating evidence is sufficient to exclude the defendant from the category of

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[4] The Louisiana statute plainly accords with the *Apprendi* rule's Sixth Amendment element (trial by jury). However, the statute is silent on the burden of proof that controls the jury's decision that death should be imposed notwithstanding any mitigating evidence (i.e. the *Apprendi* rule's Fourteenth Amendment (Due Process) element).

murderers culpable enough to receive a death sentence. A majority of the courts that have considered the issue hold *Apprendi* inapplicable, but a strong minority of states require the culpability determination, no matter how the state labels that finding, to be based on proof beyond a reasonable doubt.

This Court should grant review to resolve the conflict, and hold that where a jurisdiction conditions a death sentence upon a finding that, after consideration of mitigating evidence, death should be imposed—as Louisiana does here—that culpability determination must be made beyond a reasonable doubt.

FACTUAL BACKGROUND

Oneatha Brinson, an elderly white[5] woman, was stabbed to death in her home in Ouachita Parish, Louisiana, on September 29, 2000.

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[5] Petitioner, an African-American, asserted that race infiltrated the trial. The Louisiana Supreme Court rejected this notion, holding that "the race of the victim was never bantered about as one of her virtues," and that "in all respects, defendant's capital trial appears to have been conducted free of any racial taint." Pet. App. at 96a; *but see id.* at 67a (refraining from redressing prosecutor's failure to provide race neutral explanations under *Johnson v. California*, 545 U.S. 162 (2005), because in "this pre-*Johnson* landscape, the trial judge in the present case took a very active role in voir dire."); *see also id.* at 62a (observing that Louisiana law prevents infiltration of racism and "codifies the *Batson* ruling in La. C.Cr. P. art. 795. *See also State v. Snyder*, 1998-1078 (La. 9/6/06), 942 So.2d 484,

Petitioner, an African-American man, was arrested and charged with first-degree murder on October 2, 2000. Pet. App. at 2a. As detailed in the Louisiana Supreme Court opinion, Mr. Anderson explained to authorities that he did yard work for Mrs. Brinson, and that an argument ensued concerning when he would return to finish. Mr. Anderson stated that in the midst of the argument Mrs. Brinson said "you nigger you need to go on and do the yard work." Pet. App. at 7a-8a. At that point, as petitioner's statement to the police indicates, he just "went off." *Id.* Petitioner took a knife from Ms. Brinson's kitchen and stabbed her ten times. Throughout the remainder of his statement, and at trial, petitioner conceded responsibility for the murder.

Petitioner defended against the death sentence with evidence indicating that he was categorically exempt from capital punishment due to mental retardation.[6] Mr. Anderson also introduced

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rev'd on other grounds, Snyder v. Louisiana, ___ U.S. ___, 170 L. Ed. 2d 175, 128 S. Ct. 1203 (2008). ").

[6] At trial, a defense psychologist testified that his administration of a battery of tests including the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) placed Petitioner in the "borderline mental retardation" range. Pet. App. at 23a. The state's rebuttal psychiatrist, Dr. George Seiden, testified that petitioner's IQ score of 73 placed him outside the range of mild mental retardation. "Dr. Seiden further opined that defendant does not meet the Louisiana definition of mental retardation, because he was never

evidence to show that the death penalty was unjustified in this instance because he had suffered neurological damage after the age of 18 that diminished his personal culpability.[7]

The State submitted three aggravating circumstances in this case. The jury found that only two were supported by the evidence: (1) the victim was 65 years of age or older; and (2) the offense was committed in an especially heinous, atrocious or cruel manner. La. Code of Crim. Proc. art. 905.4(A)(10), (7).

Given clear evidence of the victim's age, there was no question that at least one aggravating circumstance existed. The only question at the penalty phase was whether the jury would decide, after considering mitigating evidence, that death was the appropriate punishment.

Ultimately, the jury returned a death verdict. Neither the trial court nor the verdict form required the jury to determine, after considering any

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diagnosed as mentally retarded before age 18." Pet. App. at 28a.

[7] Mr. Anderson suffered a significant brain trauma when he was thirty-two years old as the result of a vicious beating that left him with a contusion to the temporal region on the left side of his brain, a blow-out fracture of his eye, and a concussion with bleeding inside the brain. A doctor that observed petitioner a year after the beating noted that Mr. Anderson had slow mentation and difficulty responding to questions.

mitigating circumstances, that death was the appropriate punishment beyond a reasonable doubt.

On appeal, Petitioner observed that Louisiana's sentencing scheme required two separate findings prior to the imposition of a death sentence. Petitioner argued that, like the first determination that an aggravating factor exists, the second determination (whether, after considering mitigating evidence, death should be imposed) must be made beyond a reasonable doubt. At Mr. Anderson's penalty phase, the trial court did not instruct the jury that this latter finding needed to be made according to any particular burden of proof.

The Louisiana Supreme Court rejected petitioner's claims:

> [D]efendant asserts that the Louisiana death penalty statute is unconstitutional because it fails to require the jury to determine that death is the appropriate punishment "beyond a reasonable doubt." Citing *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), defendant complains that Louisiana's capital sentencing scheme is based on "standard-less jury discretion" which violates the Eighth and Fourteenth Amendments.
>
> However, *Ring* requires that jurors find beyond a reasonable doubt all of the predicate facts which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. *Id.*, 536 U.S. at 609 While

> defendant now argues that *Ring* should extend such a requirement to the ultimate sentence as well as the predicate facts, neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon*, 96-1208, p. 27 (La. 5/20/97), 704 So.2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.")

Pet. App. at 89a.

On October 31, 2008, the Louisiana Supreme Court denied Petitioner's timely application for a rehearing. This petition ensues.

REASONS FOR GRANTING THE WRIT

The *Apprendi* and *Ring* decisions call into question the constitutionality of Louisiana's death penalty scheme. The Louisiana Code provides that a death sentence shall not be imposed unless two predicate findings are made: first, the jury must unanimously determine beyond a reasonable doubt that a statutory aggravating circumstance exists, and second, after considering any mitigating circumstances, the jury must determine that a death sentence should be imposed. The law does not provide a standard of proof for the latter determination.

Under Louisiana law, the maximum punishment authorized for a conviction of first-degree murder and the finding of an aggravating circumstance is life without the possibility of parole. Therefore, the finding that, after consideration of mitigating evidence, death should be imposed, necessarily increases the sentencing ceiling from life imprisonment to a death sentence. Thus, the Louisiana legislature drafted its capital sentencing statute in a manner that triggers Sixth and Fourteenth Amendment protections at each of its two steps.

In addition, the unrivaled need for accuracy in the outcome of capital sentencing determinations underscores the need for the Court to step in and decide this issue. The Eighth Amendment limits imposition of the death penalty to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal citations omitted).

Only the beyond a reasonable doubt standard satisfies the Eighth Amendment's reliability demands, and accurately signals to the sentencer the degree of seriousness society affixes to the culpability determination. Since Louisiana law does not require the determination that, after consideration of mitigating evidence, a death sentence should be imposed be made "according to any particular standard" this case provides a manifestly appropriate vehicle for doing so. Pet.

App. at 89a; *see also State v. Lucky*, 755 So. 2d 845, 850 (La. 1999) ("Louisiana does not provide any standard for a juror to weigh mitigating circumstances against aggravating circumstances.").

I. *Apprendi* Applies to a Louisiana Jury's Death-Determination.

The Louisiana legislature created a sentencing scheme that makes life without the possibility of parole the maximum punishment unless the jury determines, after consideration of any mitigating evidence and the moral culpability of the offender, that death is the appropriate punishment.[8] Petitioner suggests that the jury's determination that death is the appropriate punishment – no matter how it is described – must be made upon proof beyond a reasonable doubt.

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[8] Whether this codification was done to meet the state's Eighth Amendment obligations or for other reasons, the Sixth Amendment right to a jury trial is applicable. *See Ring*, 536 U.S. at 606 (observing, the idea "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.") (internal citations omitted); *id.* at 611 (Scalia, J., concurring) ("[I]t is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event.").

A. The Fifth and Sixth Amendments require any finding that increases the maximum punishment possible to be proved beyond a reasonable doubt.

In *Sullivan v. Louisiana*, the Court observed:

> the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. *It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty*, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt.

508 U.S. 275, 278 (1993) (emphasis added). Thereafter, the Court became more explicit, holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476. Subsequently, in *Ring v. Arizona*, the Court made clear that the beyond a reasonable doubt standard applies to a jury's finding of an aggravating factor in a capital trial's sentencing phase. *See Oregon v. Ice*, No. 07-901, slip op. at 5 (U.S. Jan. 14, 2009) (noting

the Court in *Ring* applied "*Apprendi*'s rule to facts subjecting a defendant to the death penalty . . . .").[9]

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[9] In *Oregon v. Ice*, this Court identified *Apprendi*'s "animating principle" as "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Ice*, No. 07-901, slip op. at 6. The Court "accordingly considered whether the finding of a particular fact was understood as within the 'domain of the jury . . . by those who framed the Bill of Rights.'" *Id.* (internal citations omitted). Because the death penalty was mandatory at the time the Constitution was framed, the jury had no explicit role in sentencing (though it is well-recognized that juries often found defendants not guilty to ensure they were not executed). By the time the Sixth Amendment became law, "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind." *Walton v. Arizona*, 497 U.S. 639, 711 (1990) (Stevens, J., dissenting) (internal citations omitted). *Woodson v. North Carolina* removed any remaining doubt of the jury's proper role in capital sentencing determinations. In *Woodson*, this Court held the mandatory death penalty unconstitutional, forever changing the role of juries in capital cases. Due to Eighth Amendment requirements that the jury find a statutory aggravating circumstance and the sentencer consider mitigating evidence, the jury is a constitutionally necessary bulwark between the State and accused in a capital trial. And, the requirements of the Eighth Amendment cannot be used to undermine the protections guaranteed by the Sixth Amendment. *See Ring*, 536 U.S. at 612 (Scalia, J., concurring).

B. The *Apprendi* rule applies to the finding that, after consideration of any mitigating evidence, death is the appropriate punishment.

Louisiana Code of Criminal Procedure article 905.3 states unambiguously: "[a] sentence of death shall not be imposed *unless* the jury . . . after consideration of any mitigating circumstances, determines that the sentence of death should be imposed" (emphasis added). The plain meaning of the words "shall not" and "unless" establish that a death sentence may not be imposed without a jury finding that death is the appropriate punishment. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (the "statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings"); *Apprendi*, 530 U.S. at 494 ("the relevant inquiry is one not of form, but of effect."). The *Apprendi* rule applies because the finding that death is the appropriate punishment elevates the maximum sentence available.

C. Seven state legislatures and four other state courts of last resort have concluded that the finding that death should be imposed despite any mitigating evidence must be made beyond a reasonable doubt.

The statutory law of seven states supports the notion that *Apprendi* should apply to the question of

whether mitigating evidence diminishes an offender's culpability to a degree that a death sentence would not be appropriate.[10]

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[10] ARK. CODE ANN. § 5-4-603 (Arkansas) ("jury [must] unanimously return written findings that . . . aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . . Aggravating circumstances justify a sentence of death beyond a reasonable doubt."); KAN. STAT. ANN. § 21-4624 (Kansas) (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . ."); OHIO REV. CODE ANN. 2929.03(D) (Ohio) (jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors); OR. REV. STAT. § 163.150 (1)(c)-(d) (Oregon) (requiring life sentence unless proof beyond a reasonable doubt that, after considering "any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence" that defendant should "receive a death sentence."); TENN. CODE ANN. 39-13-204 (g)(1)(B) (Tennessee) ("If the jury unanimously determines that a statutory aggravating circumstance [exists], but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall . . . sentence the defendant . . . to . . . life."); UTAH CODE ANN. 76-3-207 (5)(b) (Utah) ("death penalty shall only be imposed if . . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation."); WASH. REV. CODE ANN. 10.95.060 (Washington) (jury must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency).

Four state courts of last resort hold that *Apprendi* applies to the determination of whether death should be imposed despite any mitigating evidence. *See Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc) (a jury—rather than a three-judge panel—must "be convinced beyond a reasonable doubt that any mitigating factors did not outweigh the proven statutory aggravating factors."); *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (*Apprendi* rule applicable to weighing determination because a "finding [that no mitigation evidence outweighs aggravation evidence] is necessary to authorize the death penalty in Nevada."). The Connecticut and Wyoming Supreme Courts interpret their state statutes and constitutions to comply with *Apprendi* and *Ring*. *See State v. Rizzo*, 266 Conn. 171, 242 (2003) (finding "the jury must be instructed that its level of certitude be beyond a reasonable doubt when determining that the aggravating factors outweigh the mitigating factors . . ."); *Olsen v. State*, 2003 WY 46, 67 (Wyo. 2003) ("If the jury is to be instructed to "weigh" . . . *the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.*" (emphasis added)).

D. Ten state courts and four federal circuits hold *Apprendi* inapplicable to any capital sentencing determination beyond the finding of an aggravating circumstance.

Employing varying rationales, ten state courts and four federal circuits hold *Apprendi* inapplicable

to the culpability determination. Six state courts of last resort explain that *Apprendi* does not apply because the weighing process mandated by their capital sentencing schemes is not a factual determination. The Illinois Supreme Court, in *People v. Ballard*, 206 Ill.2d 151 (2002), addressed the applicability of the *Apprendi* rule to capital sentencing determinations beyond the finding of an aggravating factor. Ballard contended that it was "inaccurate to conclude that the death penalty is authorized by the facts found by the jury after the first stage of death penalty proceedings, because this second finding must still be made, unanimously, before that penalty can be imposed." *Id.* at 203. The Illinois Supreme Court noted that the defendant's argument "appear[ed] to find some support in *Ring*." That Court ultimately distinguished *Ring*, however, on the basis that Ballard's "complaint concern[ed] mitigating, not aggravating, factors," and though it was bound by this Court's precedents, it was "not bound to extend the decisions." *Id.* at 205; *see also Ex parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002) ("weighing process is not a factual determination," but instead "a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum"); *accord People v. Lewis*, 43 Cal. 4th 415, 521 (2008) ("[t]here is no federal constitutional requirement that a jury [] conduct the weighing of aggravating and mitigating circumstances . . ."); *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003) ("the weighing process is not a fact-finding one based on evidence."); *Commonwealth*

v. Roney, 866 A.2d 351, 360 (Pa. 2005) ("[b]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *State v. Fry*, 126 P.3d 516, 534 (N.M. 2005) ("balancing process is not 'a fact necessary to constitute the crime with which [the defendant] is charged' such that it would invoke the constitutional requirement of proof beyond a reasonable doubt . . ." (internal citation omitted)).

Four other state courts of last resort hold *Apprendi* inapplicable, asserting the weighing function does not increase the maximum punishment. *See Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004) ("The outcome of weighing does not increase eligibility . . . [and] is therefore not required to be found by a jury under a reasonable doubt standard.");[11] *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) ("the weighing . . . does not increase the punishment [but] ensures that the punishment imposed is appropriate and proportional."); *State v. Gales*, 265 Neb. 598, 627-628 (2003) ("These [weighing] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination."); *Torres v. State*, 58 P.3d 214, 216

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[11] *But see Ritchie*, 809 N.E.2d at 273 (Rucker, J., dissenting in part, concurring in part) ("The plain language of Indiana's capital sentencing scheme makes death eligibility contingent upon certain findings that must be weighed by the jury . . . they are at a minimum the type of findings anticipated by *Apprendi* and *Ring* and thus require proof beyond a reasonable doubt.").

(Ok. Crim. 2002) ("It is [the aggravating factor] finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death.").

Four federal courts of appeals similarly refuse to apply *Apprendi* to stages of the capital sentencing procedure beyond the finding of an aggravating factor. In *United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007), the Ninth Circuit held, over the dissent of Judge Reinhardt,[12] that the beyond a reasonable doubt standard does not apply at the weighing stage because "the weighing step is an equation that merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate." *Id.*; *see also United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007) ("the requisite weighing [provision of the Federal Death Penalty Act] constitutes a process, not a fact to be found."); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) ("the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact [but rather]

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[12] Dissenting, Judge Reinhardt, underscored: "There is no doubt that the finding that aggravating factors outweigh mitigating factors increased Mitchell's maximum punishment [under the Federal Death Penalty Act]." *Id.* (citing 18 U.S.C. § 3593(e) ("whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death. . ."). "Absent this finding," Judge Reinhardt reasoned, "the maximum sentence the court could have imposed would have been life imprisonment without the possibility of release." *Id.*

it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves."); *accord United States v. Barrett*, 496 F.3d 1079, 1107-1108 (10th Cir. 2007) (same).

E. Confusion exists in at least three states regarding not if, but how *Apprendi* applies.

On remand from this Court's decision in *Ring v. Arizona*, the Arizona Supreme Court dismissed the state's contention that the *Apprendi* rule did not apply to the weighing stage of the state sentencing statute. *See State v. Ring*, 204 Ariz. 534 (Ariz. 2003) (Ring II); *but see State ex rel. Thomas v. Granville*, 211 Ariz. 468 (2005) (finding that the trial court erred in proposing to instruct jurors that if they entertained a doubt whether death was the appropriate sentence they must impose a sentence of life in prison).

Similarly, in Missouri, the state Supreme Court determined that *Apprendi* applied to its statute's weighing determination. *See State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003). However, the same court validated the legislative scheme that placed the burden of persuasion for the weighing determination on the defendant rather than the State. *See State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo. Banc 2008) (upholding death sentence where jury did not unanimously determine that mitigating evidence outweighed aggravating

evidence); *see also McLaughlin v. Missouri*, No. 08-822 (*petition for certiorari*, filed Dec. 29, 2008).

Whether the culpability determination must be made beyond a reasonable doubt also remains unclear in Idaho. *See State v. Lovelace*, 90 P.3d 298, 301 (Idaho 2004) (noting that a revision of the statute after *Ring* requires "that a jury find and consider the effect of aggravating and mitigating circumstances in order to decide whether a defendant should receive a death sentence," but not stating whether that determination must be made beyond a reasonable doubt).

F. *Sattazahn v. Pennsylvania* illustrates why the determination that death should be imposed is constrained by the Sixth and Fourteenth Amendments.

In *Sattazahn*, this Court observed:

> we held [in *Ring*] that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an

"offence" for purposes of the Fifth Amendment's Double Jeopardy Clause.

Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003). *Sattazahn* held that jeopardy did not attach when the jury at petitioner's capital murder trial could not decide whether death was warranted. However, the Court explained, had the jury found that no aggravating factors existed, then "double-jeopardy protections [would have] attach[ed] to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'" *Id.* at 112. If the jury, after considering the mitigation evidence and the previously found aggravating circumstances, decided to impose a sentence of life imprisonment, the Double Jeopardy Clause would prevent the state from re-trying the sentencing phase in the event of reversal on appeal.[13] *Bullington v. Missouri*, 451 U.S. 430 (1981).

G. The *Apprendi* rule applies even though the jury's finding that death is the appropriate punishment is a moral determination.

Though several state courts reject the application of *Apprendi* because the finding that

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[13] Given *Sattazahn*'s holding that Fifth and Sixth Amendment "facts" are coterminous, courts that have held the death-worthiness determination to be something other than a factual finding have implied that jeopardy does not attach to the death sentence.

death is appropriate is a moral determination, other jury findings often involve exactly this type of moral determination. *See Schriro v. Summerlin*, 542 U.S. 348, 361 (2004) (Breyer, J., dissenting) ("The leading single aggravator charged in Arizona . . . requires the factfinder to decide whether the crime was committed in an 'especially heinous, cruel, or depraved manner.'") (internal citations omitted); *Id.* ("Words like 'especially heinous,' 'cruel,' or 'depraved' – particularly when asked in the context of a death sentence proceeding – require reference to community-based standards, standards that incorporate values."). In fact, morality based fact-finding performs an essential Eighth Amendment function by narrowing the universe of offenders for whom the death penalty is appropriate. *See, e.g., California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (rendering of a death sentence must be "directly related to the personal culpability of the criminal defendant," and "reflect a reasoned moral response to the defendant's background, character, and crime . . . ."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"). Moreover, the determination that a defendant is culpable enough to receive a death sentence is no different (functionally) from a determination that a homicide is justified, mitigated by heat of passion, or deliberate. These determinations involve applying facts (mitigating

and aggravating) to a moral inquiry in order to make a judgment.[14]

H. *Apprendi*'s applicability does not turn on capital sentencing nomenclature.

Capital sentencing determinations – no matter how they are labeled – require the fact-finder to consider the mitigation evidence in the context of the aggravating circumstances and then decide whether death should be imposed. Some states instruct the fact-finder to weigh mitigation evidence against aggravation evidence, other states ask whether the mitigation evidence is sufficient to call for a sentence of life imprisonment (as opposed to a death sentence), and still others, like Louisiana, require the fact-finder to consider mitigation evidence and then simply decide whether to impose death.[15]

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[14] It would violate the Sixth Amendment for a jury to determine that a defendant committed a homicide beyond a reasonable doubt, but that the offense was intentional and not mitigated by heat of passion by only a preponderance of the evidence. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) ("[R]efusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.").

[15] *See Brown v. Sanders*, 546 U.S. 212, 216-17 (2006) ("The [weighing/non-weighing] terminology is somewhat misleading, since we have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence." (emphasis in original)).

Where life without the possibility of parole is the maximum punishment without a jury's determination that, after considering any mitigation evidence, death is an appropriate punishment, the culpability finding must be made beyond a reasonable doubt regardless of whether or not the state labels it a weighing determination. *See Ice*, No. 07-901, at dissenting op. 2 (Scalia, J., dissenting) ("We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee. We long ago made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition . . . .").

In Louisiana, the culpability determination – no matter how the state labels it – is a prerequisite to the imposition of a death sentence. The applicability of the *Apprendi* rule does not turn on whether the finding at issue implicates the selection or eligibility phase. *See Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) ("drawing an arbitrary line in the sand between the 'eligibility and selection phases' of the sentencing decision is, in my view, incoherent and ultimately doomed to failure."). The claim that a death sentence is the statutorily available punishment once a defendant is found death-eligible misconstrues the term "eligible" and is incorrect in states such as Louisiana where life without the possibility of parole is the maximum punishment absent a finding by the jury that, after any considering mitigating evidence, death is the appropriate punishment.

II. The Eighth Amendment Forbids Standard-Less Procedures for Determining Death-Appropriateness.

A. The Eighth Amendment requires heightened accuracy in the administration of capital punishment.

At the adoption of the Eighth Amendment, states "uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976). Legislatures moved away from mandatory sentencing only as juries became unwilling to impose death sentences for certain offenders, and issued "not guilty" verdicts in order to avoid authorizing capital punishment. *See id.* at 291 ("Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.").[16] As mandatory capital sentencing disappeared from the national landscape, this Court found that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and

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[16] *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring) (discretionary sentencing in capital cases "was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction.").

the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 288 (barring mandatory imposition of the death penalty as inconsistent with the Eighth Amendment).

Not only must capital sentencing determinations be individualized, but "[t]he rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application." *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2665 (2008). Moreover, to comply with the Eighth Amendment, capital sentencing procedures must reliably determine that offenders who receive the death penalty are those who have committed the most severe crimes and have personal histories that do not diminish their culpability to a degree where the death penalty would be inappropriate. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *id.* at 605 (the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

B. Louisiana's standard-less procedure for determining when death should be imposed does not fulfill the Eighth Amendment's accuracy and consistency requirements.[17]

The Louisiana sentencing scheme "does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard." Pet. App. at 89a. Nor does the Louisiana scheme provide a standard of proof to measure the level of certainty that the jury has in making the determination that death should be imposed. In short, Louisiana imposes no safeguard to ensure that those who receive a death sentence are more culpable than those against whom the jury found an aggravating circumstance but nonetheless recommended a life sentence.[18]

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[17] This standard-less system for determining which defendants should receive a death sentence notwithstanding any mitigating evidence may be responsible for the significant number of death sentences in Louisiana for juveniles and individuals with mental retardation prior to this Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002).

[18] This Court last considered Louisiana's statutory scheme for determining which defendants should live, and which should die, in 1988. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Since *Lowenfield*, Louisiana has drastically expanded the statutory aggravating circumstances available to the prosecution, while reducing limitations on other evidence that the jury may consider in making the death determination. When this Court

C. The proof beyond a reasonable doubt standard captures the gravity of the decision to sentence a person to death.

Assignment of a standard of proof clues in the jury as to the "degree of confidence our society thinks [it] should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Thus, because society has "minimal concern" for the outcome of civil suits, the plaintiff's burden of proof in private suits is "a mere

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decided *Lowenfield*, the Louisiana statute contained five aggravating factors at the guilt phase and nine aggravating factors at the penalty phase. *See id.* at 241 & 243 n.6. Subsequently the Louisiana Legislature has added four aggravating factors at the guilt stage, including a factor that was alleged and found in this case: the age of the victim was over sixty-five. La. R.S. 14:30 (5). Similarly, the legislature added three additional circumstances at the penalty phase, including the age of the victim. *See* La. C. Cr. P. art. 905 (4)(A)(10). Moreover, in a number of decisions since *Lowenfield*, the Louisiana Supreme Court has vastly expanded the type of evidence admissible for the jury to consider in addition to the evidence in support of an aggravating circumstance. At the same time, the Court has increasingly constrained its review of underlying capital convictions. The expansion of the class of capital defendants, along with the Louisiana Supreme Court's reluctance to carefully review capital convictions, exacerbates the problem that juries are repeatedly instructed that there is no standard for determining who should live and who should die. By failing to ensure that only the "worst of the worst" are sentenced to death, the Louisiana scheme raises grave Eighth Amendment and Fourteenth Amendment Due Process Clause concerns.

preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 423 (1979). On the other hand, in criminal cases, "society imposes almost the entire risk of error upon itself . . . [by requiring] the state prove the guilt of an accused beyond a reasonable doubt." *Id* at 424 (citing *In re Winship*, 397 U.S. at 370 (1970)). The reason for the more stringent burden in criminal cases stems from the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 423–24.

Given the constitutional command that capital sentencing determinations be more accurate and reliable than the outcome of any other criminal determination, the finding that death should be imposed must be made according to society's most stringent standard. *See Summerlin*, 542 U.S. at 362 (Breyer, J., dissenting) (the law "requires a correspondingly greater degree of scrutiny of the capital sentencing determination than of other criminal judgments") (citing *California v. Ramos*, 463 U. S. 992, 998-99 (1983)); *id.* ("This Court has made clear that in a capital case the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case. Hence, the risk of error that the law can tolerate is correspondingly diminished.") (citing *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993)); *see also Baze v. Rees*, 128 S. Ct. 1520 (2008) (Stevens, J., concurring) ("[G]iven the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me); *Id.* ("Whether or not any

innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

D. A growing number of states limit the death penalty to instances where a jury has determined beyond a reasonable doubt that death is the appropriate punishment.

Fourteen states, as well as the District of Columbia, ban capital punishment.[19] At least twelve additional states require the determination that death is the appropriate sentence to be made on proof beyond a reasonable doubt. *See* pp 21-22 *and* n.10, *supra*.[20]

III. The Issue is Ripe for this Court's Resolution.

There is no ambiguity in the decision below: In Louisiana, no standard guides the jury's death-determination of whether death is the appropriate

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[19] *See* Death Penalty Information Center, Death Penalty Policy By State, *available at* http://www.deathpenaltyinfo.org/death-penalty-policy-state (last visited December 10, 2008).

[20] Arizona, Arkansas, Colorado, Connecticut, Idaho, Kansas, Ohio, Oregon, Tennessee, Utah, Washington, and Wyoming.

punishment.[21] The constitutional concerns raised by this standard-less procedure are squarely presented on this record. *See* Pet. App. at 89a. No procedural impediments exist. Moreover, the conflict in the lower courts over *Apprendi*'s applicability to the culpability-finding is entrenched, and their holdings

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[21] *Cf. Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of the petitions for certiorari) (citing to *State v. Wood*, 648 P. 2d 71, 83 (Ut. 1982)). In *Smith*, Justice Stevens noted that the *Wood* opinion described "the appropriate standard to be followed by the sentencing authority":

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

Id. (quoting *Wood*). Justice Stevens' comments concerning the denial of certiorari noted that the statute in North Carolina merely provided ambiguity under which the jury might erroneously ascribe the incorrect standard, and that the question remained "open for consideration in collateral proceedings." In Louisiana, the issue does not involve the ambiguity of the instruction but rather implicates directly the statutory scheme. While the issue is directly presented for this Court's review by this petition, the availability of collateral review on that issue is now an open question. *See Tyler v. Cain*, 533 U.S. 656 (2001). Resolving this issue here and now will provide accuracy, reliability, and constitutional fidelity to the administration of capital punishment in Louisiana.

are often outcome determinative in capital cases. Further percolation is unlikely to provide clarity or to ease the tensions below.[22] This Court should resolve the issue here and now to ensure accuracy and reliability in the administration of capital punishment in Louisiana.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[22] A similar issue was raised in *McLaughlin v. Missouri*, 08-822, presently before this Court. Petitioner suggests that the question presented in this case overlaps with the issue presented in *McLaughlin* and in the other jurisdictions dealing with the lacunae addressed in this petition.

APPENDIX A

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

HENRY JOSEPH ANDERSON,

06-KA-2987 (La. 09/09/08); 2008 La. LEXIS 1744

NOTICE:

THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.

SUBSEQUENT HISTORY: Rehearing denied by State v. Anderson, 2008 La. LEXIS 2496 (La., Oct. 31, 2008)

PRIOR HISTORY:

On Appeal from the Fourth Judicial District Court, For the Parish of Ouachita. Honorable Marcus R. Clark, Judge.

DISPOSITION: AFFIRMED.

OPINION BY: JOHNSON

On October 11, 2000, a Ouachita Parish grand jury indicted the defendant, Henry J. Anderson, for the September 29, 2000, first degree murder of Oneatha Brinson, in violation of LSAR.S. 14:30. Trial commenced on April 25, 2005. On April 27, 2005, the jury returned a unanimous verdict of guilty as charged. After the penalty phase, the jury unanimously recommended a sentence of death, after finding two of the three aggravating circumstances, namely, that the victim was older than 65 years old, La. C.Cr. P. art. 905.4(A)(10); and that the offense was committed in an especially heinous, atrocious, or cruel manner, La. C.Cr. P. art. 905.4(A)(7). On June 16, 2005, the trial judge imposed the sentence of death by lethal injection in accordance with the jury's verdict.[1]

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[1] No post-trial motions were filed on the defendant's behalf.

The Defendant brings this direct appeal of his conviction and sentence to this Court pursuant to La. Const. art. V, § 5(D)[2], raising 19 assignments of error. For the reasons that follow, we find that none of the arguments put forth constitute reversible error, and affirm the defendant's conviction and sentence.

Facts

One week before her death, the victim, 85yearold Oneatha Brinson, hired defendant, Henry Joseph Anderson, for the first time to cut the grass at her home in Monroe, Louisiana, having received a referral from her neighbor. Mrs. Brinson paid defendant in cash.

On Friday morning, September 29, 2000, defendant returned to Mrs. Brinson's home in hopes of lining up more yard work, but Mrs. Brinson was not home. Defendant returned to the victim's home later that afternoon, riding his bicycle. Given the late hour, the two tried to arrange a time in the near future for the work to be done. The following day was not convenient for Mrs. Brinson, as she told defendant she was planning to go to a football game, so the two went inside Mrs. Brinson's home to consult her calendar, which was in her kitchen. Once inside, Mrs. Brinson offered defendant a cold drink, and he accepted a glass

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[2] La. Const. art. V, § 5(D) "... provides in: "... a case shall be appealable to the Supreme Court if ... (2) the defendant has been convicted of a capital offense and a penalty of death actually has been imposed."

of water. Defendant then removed a butcher knife from a wall rack, stabbed Mrs. Brinson over 10 times, and left her to die on her kitchen floor. At one point, Mrs. Brinson tried to raise up, so defendant took the drinking glass she had offered him earlier and beat her on the head with it. Defendant washed the blood from the knife and the glass and put them both away. Defendant then went through Mrs. Brinson's house to find items he could steal. He took some coins, a small TV/VCR combination, and the keys to Mrs. Brinson's car. Defendant placed his bicycle in the trunk and left the scene in the victim's white Cadillac.

On Saturday, September 30, 2000, a little before 6:30 p.m., the victim's sister, Tina Stephenson, and Stephenson's daughter, Karen Hudson, the victim's niece, arrived at the victim's house. The women had planned to go to the University of Louisiana at Monroe (ULM) football game, as they were season ticket holders. Stephenson noticed that her sister's car was not in the driveway, but she just assumed that Mrs. Brinson was at evening mass, so she used her key to let herself into her sister's home. Upon entering, Stephenson was startled to see her sister's lifeless body sprawled on the kitchen floor, with dried blood all around, and the victim's purse and its contents scattered on the floor. When Stephenson screamed, her daughter, Hudson, came running in. Hudson attempted to call 911, but the kitchen telephone cord had been ripped from the wall, so she made the call from the adjacent room.

When Monroe Police Department officers arrived, the morning newspaper for that day (September 30, 2000) was still uncollected at the front door. They checked Mrs. Brinson for vital signs, and given the stiffness of the victim's body and the dried and darkened blood on the scene, the officers estimated that the victim had been dead for at least several hours. A Ouachita Parish Coroner's Office deputy pronounced the victim dead on the scene.

The officers processed the scene and took photographs. They detected no sign of forced entry to Mrs. Brinson's home. However, upon investigating the house, the police noted an office safe was standing open with several coins strewn on the floor, suggesting that the area had been rifled through, and perhaps items taken from the safe. In the victim's bedroom, the officers noticed an obvious vacant place on the bureau opposite the bed. A Cablevision line was hanging loose from the wall suggesting that a television had been removed. Nearby, the officers located an owner's manual for a "Symphonic" brand 13" TV/VCR combination.

The officers learned from the victim's relatives that the victim's car was missing. The police immediately issued an all points bulletin for a 1989 white, fourdoor Cadillac Deville. At approximately 10:00 p.m., while officers were still processing the crime scene, a deputy with Ouachita Parish Sheriff's Office (OPSO) located and stopped Mrs. Brinson's stolen vehicle with three occupants inside. Detective Doug Tarver left the crime scene at the Brinson home and relocated to 102

Stonegate in the Tanglewood area, where several OPSO officers had the three suspects who had been in the vehicle when it was stopped. Henry Patrick, Rashon Johnson, and Larry Thomas were handcuffed and on the ground. Several OPSO vehicles were on the scene, and a crowd of onlookers was beginning to gather. Defendant was lurking about close to the scene at 102 Stonegate, which drew Det. Tarver's attention, and caused him to collect defendant's name, address, and date of birth. Since the OPSO deputies indicated that only three occupants had been in the victim's car, only those three suspects were transported, separately, to Monroe Police Department for questioning.

The three suspects were advised of their Miranda rights. Each of the three suspects was questioned individually, and it became immediately apparent by their candid shock when they learned that the interview was not with respect to a stolen car, but rather, the police were questioning them about a homicide, that they had not been involved in the murder. Each suspect related that defendant, Henry Anderson, had been the first person to show up in the Tanglewood neighborhood driving the Cadillac the day before, and that he had subsequently "loaned" the vehicle to Marion Roberson, a/k/a Punchie, whom they had just dropped off, when OPSO stopped them. Based on that information, Det. Tarver compiled a photo lineup, and each of three suspects identified defendant. Henry Patrick also told the officers that defendant had been present at the Stonegate scene when they were taken into custody. In addition, Larry

Thomas admitted that he had purchased some bags of coins from defendant earlier. Thomas called his sister, Diane Thomas, who brought the bags of coins to Monroe Police Department.

On October 2, 2000, defendant was arrested at his home, pursuant to a warrant. After the officers advised him of his Miranda rights, which he acknowledged he understood, and voluntarily waived, defendant gave a recorded statement in the presence of Detectives James Clark, Doug Tarver and Chuck Roark, where he related to the officers the events of the late afternoon of September 29, 2000. He claimed that once he and Mrs. Brinson went inside her kitchen to discuss when he would come back to do the yard work, an argument ensued.

> A. She was just start running off about why you ain't doing the yard ... why you didn't come do the yard I say I'm not gonna do the yard late this afternoon ... she said well you got your gloves. I said well I'm not gone do it ... I said I came by here earlier to do the yard.
>
> Q. Mmmhuh?
>
> A. And she called me a nigger and I said well let me just leave up out of here.
>
> Q. How'd she say it ... I mean de ... describe to me a minute?

> A. She said you nigger you need to go on and do the yard.
>
> Q. Oh really?
>
> A. I said well I don't grit down like that so I say my best out is just to leave. And I started walking towards the door ... when I reached my hand to grab the door she got a knife and she cut my arm right by my wrist.

In his statement, defendant claimed that at when he started to leave, the victim got a knife and cut his arm near his wrist. At that point, he just "went off" and took the knife from Mrs. Brinson, and as he was standing there holding the knife, she ran up to him and impaled her chest onto the knife. Defendant showed the officers an old, healed wound on his arm, claiming that was where Mrs. Brinson had attacked him. The officers obviously did not believe that wound had been inflicted recently, but photographed it, nonetheless. Although, initially, defendant claimed that Mrs. Brinson ran herself into the knife, he finally admitted to a struggle where he accidently stabbed himself in the leg, and became so enraged that he subsequently stabbed the victim several more times. The officers also photographed the self-inflicted leg wound. Defendant admitted to washing the knife and the glass, then walking through the house, gathering items and placing them by the back door, before loading them into the victim's car. Defendant admitted to police that he acted alone in the stabbing death of Mrs. Brinson.

Mental Retardation for Purposes of Death Penalty (*Atkins*)

The Defendant contends that the definition of mental retardation in La. C.Cr. P. art. 905.5.1, requiring the onset before the age of 18, violates his Equal Protection and Due Process Rights.

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the United States Supreme Court held that execution of mentally retarded persons constitutes an excessive punishment, and thus violates the Eighth Amendment of the United States Constitution. This Court addressed *Atkins* in *State v. Williams*, 011650, p. 27 (La. 11/01/02), 831 So. 2d 835, 857, and directed trial courts in post-*Atkins* hearings:

> (1) to order a pretrial evidentiary hearing on the issue of mental retardation when the court has "reasonable grounds" to believe a defendant is mentally retarded, La. C.Cr. P. art. 643.
>
> (2) to hold the hearing before a judge, not a jury.
>
> (3) to require the defendant to prove by a preponderance of the evidence that he meets the criteria established in Louisiana's statutory definition of mental retardation, LSAR.S.28:381 [defining retardation as "significantly subaverage general intellectual

> functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period"].

In response to both *Atkins* and *Williams*, the legislature enacted 2003 La. Acts 698, which created La. C.Cr. P. art. 905.5.1.[3] The code article provides for

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[3] La. C.Cr. P. art. 905.5.1 . Mental retardation

> A. Notwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death.
>
> B. Any capital defendant who claims to be mentally retarded shall file written notice thereof within the time period for filing of pretrial motions as provided by Code of Criminal Procedure Article 521.
>
> C. (1) Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.
>
> (2) Any pretrial determination by the judge that a defendant is not mentally retarded shall not preclude the defendant from raising the issue at the penalty phase, nor shall it preclude any instruction to the jury pursuant to this Section.
>
> D. Once the issue of mental retardation is raised by the defendant, and upon written motion of the district

attorney, the defendant shall provide the state, within time limits set by the court, any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, and any other information of any kind reviewed by any defense expert in forming the basis of his opinion that the defendant is mentally retarded.

E. By filing a notice relative to a claim of mental retardation under this Article, the defendant waives all claims of confidentiality and privilege to, and is deemed to have consented to the release of, any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, expert opinions, and any other such information of any kind or other records relevant or necessary to an examination or determination under this Article.

F. When a defendant makes a claim of mental retardation under this Article, the state shall have the right to an independent psychological and psychiatric examination of the defendant. A psychologist conducting such examination must be licensed by the Louisiana State Board of Examiners of Psychologists. If the state exercises this right, and upon written motion of the defendant, the state shall provide the defendant, within time limits set by the court, any and all medical, correctional, educational, and military records, and all raw data, tests, test scores, notes, behavioral observations, reports, evaluations, and any other information of any kind reviewed by any state expert in forming the basis of his opinion that the defendant is not mentally retarded. If the state fails to comply with any such order, the court may impose sanctions as provided by Article 729.5.

G. If the defendant making a claim of mental retardation fails to comply with any order issued pursuant to Paragraph D of this Article, or refuses to submit to or fully cooperate in any examination by experts for the state pursuant to either Paragraph D or F of this Article, upon motion by the district attorney, the court shall neither conduct a pretrial hearing concerning the issue of mental retardation nor instruct the jury of the prohibition of executing mentally retarded defendants.

H. (1) "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

(2) A diagnosis of one or more of the following conditions does not necessarily constitute mental retardation:

(a) Autism.

(b) Behavioral disorders.

(c) Cerebral palsy and other motor deficits.

(d) Difficulty in adjusting to school.

(e) Emotional disturbance.

(f) Emotional stress in home or school.

(g) Environmental, cultural, or economic disadvantage.

(h) Epilepsy and other seizure disorders.

a procedure to be used in the event that a defendant raises a claim of mental retardation. Under the article, such a defendant has the burden of proving mental retardation by a preponderance of the evidence. La. C.Cr. P. art. 905.5.1(C)(1). The article defines mental retardation as:

> a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in

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(I) Lack of educational opportunities.

(j) Learning disabilities.

(k) Mental illness.

(l) Neurological disorders.

(m) Organic brain damage occurring after age eighteen.

(n) Other handicapping conditions.

(o) Personality disorders.

(p) Sensory impairments.

(q) Speech and language disorders.

(r) A temporary crisis situation.

(s) Traumatic brain damage occurring after age eighteen.

> conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

La. C.Cr. P. art. 905.5.1(H)(1).

The article concludes with an advisory list of several medical conditions which do not necessarily constitute mental retardation. La. C.Cr. P. art. 905.5.1(H)(2). Included on the list are mental illness, organic brain damage occurring after age 18, learning disabilities, speech and language disorders, and personality disorders. In *Atkins*, the United States Supreme Court also suggested factors to consider for the determination of mental retardation:

> Clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but

> there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318, 122 S.Ct. at 225051.

In the instant case, the Defendant contends that the preponderance of the evidence in the record demonstrates that he suffers from mental retardation, and that his execution by the State would constitute cruel and unusual punishment. During pretrial motions hearings, the defense filed a notice of intent to claim mental retardation, and subsequently, filed a memorandum in support in which the defense sought to declare Louisiana's definition of mental retardation unconstitutional because La. C.Cr. P. art. 905.5.1 requires the onset of retardation to occur before age 18. The State filed a memorandum in opposition. The trial court conducted a hearing and subsequently denied defendant's motion to declare La. C.Cr. P. art. 905.5.1 unconstitutional. The defense objected and gave notice of its intent to seek writs. The court of appeal denied defendant's writ and affirmed the trial court's ruling upholding, making the following observation:

> The defense seeks a judicial declaration that La. C.Cr. P. art. 905.5.1 relating to the capital sentencing of persons who are

> mentally retarded is unconstitutional "because it fails to take into consideration that a person can suffer a disability characterized by significant limitations in intellectual function and adaptive behavior after the age of eighteen." The defense is asking this court to extend the holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and to redefine mental retardation as used in that case. We decline to so rule at this time. We find no error in the district court's judgment.

State v. Anderson, 39,232 (La.App.2d Cir. 7/29/04) So. 2d .

For whatever reason, the defense did not file a writ application with this Court. Nevertheless, at the penalty phase, the defense argued that defendant's mental retardation was a complete bar to the death penalty, not merely a mitigating circumstance.[4]

Likewise, defense counsel's opening statement advised the jury that they would be "called upon to consider and determine whether Henry Anderson was mentally retarded. Mental retardation is a separate issue from

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[4] The jury was charged that a factual finding of mental retardation would exempt defendant from capital punishment. In its opening statement in the penalty phase, the state informed the jury that "the defendant has given notice that he claims to be mentally retarded. Under Louisiana law, if you find that the defendant is mentally retarded, then he cannot be subjected to the death penalty."

mitigating circumstances.... If you find mental retardation, then your verdict cannot be the death penalty, even without any other mitigating circumstances."

And the trial court's penalty phase instructions notified the jury as follows:

> A defendant who is mentally retarded may not be subjected to the death penalty. In determining whether the defendant is mentally retarded, you should consider all of the evidence presented bearing on the defendant[']s mental condition including the testimony of experts and other witnesses and the conduct and actions of the defendant. A defendant who makes a claim that he is mentally retarded must prove the allegation by a preponderance of the evidence. Thus the defendant must establish that it is more likely than not that he is mentally retarded. Mental retardation means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, or practical adaptive skills. The onset must occur before the age of eighteen.

Thereafter, the judge read to the jurors the diagnoses listed in La. C.Cr. P. art. 905.5.1(H)(2)(a) through (s). Finally, the judge instructed the jury: "In addition to considering whether a defendant is mentally retarded, you may also, you may consider any evidence

regarding his mental condition as a mitigating circumstance in your consideration of proper sentence in this case."

Here, appellate counsel reiterates the argument that La. C.Cr. P. art. 905.5.1 deprives an individual of his basic right to life by excluding him from exemption from the death penalty based solely on the age of onset of his symptoms of mental retardation, and that such a deprivation violates defendant's rights under the Equal Protection Clause and cannot survive strict scrutiny.

In *State v. Turner*, 05-2425 (La. 7/10/06), 936 So.2d 89, this Court upheld the constitutionality of La. C.Cr. P. art. 905.5.1 and upheld the statute's provision that a jury serve as the fact-finder on the question of mental retardation during a capital sentencing hearing. Although the "onset by age eighteen" provision was not at issue in *Turner*, the Court did note generally that "a statute is presumed to be valid and its constitutionality should be upheld whenever possible." *Turner*, 05-2425, at 4, 936 So.2d at 94. Moreover, the provision that the onset of mental retardation manifest by age 18 comports with Atkins, the American Association of Mental Retardation (AAMR), see AAMR, Mental Retardation, p. 1 (10th ed. 2002), the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), see DSMIV, p. 41 (2000), and the definitions provided for by most of the states that have statutes prohibiting execution of the mentally retarded.

However, as reflected by defendant's argument, the incorporation of a clinical diagnostic profile into Eighth Amendment jurisprudence illustrates the cautionary note sounded by the American Psychiatric Association, that "[w]hen the DSMIV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood." DSMIV, pp. xxxiiiii. The onset age of 18 represents an essential feature of the diagnosis because mental retardation belongs to a set of disorders "that are usually first diagnosed in infancy, childhood, or adolescence. . . [a]lthough . . . the disorders sometimes are not diagnosed until adulthood." DSMIV, p. 39. By its clinical definition, mental retardation is a developmental disorder in the sense that "the predominant disturbance is in the acquisition of cognitive, language, motor, or social skills." DSMIII, p. 28 (1990). Pertinent to defendant's equal protection arguments are the following observations in DSMIII (not carried forward in DSMIV):

> By definition, Mental Retardation requires that onset be before age 18. When a similar clinical picture develops for the first time after the age of 18, the syndrome is a Dementia, not Mental Retardation, and is coded within the Organic Mental Disorders section of the classification. An example would be a 19yearold with previously normal intelligence who developed the clinical picture of Mental Retardation after

> sustaining brain damage in an automobile accident. However, a Dementia can be superimposed on previously existing Mental Retardation. An example would be a child with mild Mental Retardation whose functioning deteriorates after sustaining brain damage in an automobile accident. When the clinical picture develops before the age of 18 in a person who previously had normal intelligence, Mental Retardation and Dementia should both be diagnosed. DSMIII, p. 29.

Louisiana's statute reflects these distinctions. The various disorders enumerated in La. C.Cr. P. art. 905.5.1(H)(2) which do not "necessarily constitute mental retardation" do not, as counsel suggests, create a separate class of disorders free of the onset age requirement. Consistent with the observations in DSMIII, they may lead to a diagnosis of mental retardation if they occur before the age of 18. Nevertheless, while these distinctions appear entirely consistent within the frame work of a clinical diagnosis, they can appear arbitrary when applied in a legal context, which should require a principled basis for distinguishing between the 19-year who has marked IQ deficiency, and clear adaptive skills impairment as the result of organic brain damage sustained in an automobile accident and the 17-year old who has marked IQ and adaptive skills deficiencies as the result of genetic makeup or ingestion of lead paint (as in the case of Corey

Williams, see *State v. Williams*, 011650 (La. 11/01/02), 831 So.2d 835).

The United States Supreme Court has made clear that mental retardation is not "a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). Although the class of mentally retarded persons is scarcely homogenous and encompasses "those whose disability is not immediately evidence to those who must be constantly cared for . . .," Id., 473 U.S. at 442, 105 S.Ct. at 325556, this "large and diversified group," *Id.*, can be defined as a class of developmentally disadvantaged persons for whom a legislature may accord different and special treatment if it has a rational basis for doing so. On the other hand, the group of persons who function at the same mental and adaptive level as the result of other clinical disorders (including dementia caused by traumatic organic brain damage) not related to developmental disadvantages is far more diffuse and much harder to define, and includes those persons who have lost cognitive, language, motor, or social skills, as opposed to those persons who failed to acquire those same skill at an appropriate age. A legislature may rationally treat the two classes differently for purposes of deciding who is and who is not exempt from capital punishment, according special treatment to mentally retarded persons because of the developmental nature of their disorder, while according those in the latter category the opportunity

of demonstrating specifically why their disorders mitigate the moral culpability of their act. Cf. La. C.Cr. P. art. 905.5(e) (mitigating circumstance that at the time of the offense "the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease of defect or intoxication").

Any rational system of classification may produce seemingly arbitrary anomalies. A normal 16-year-old who suffers traumatic brain damage in an automobile accident may receive a diagnosis of mental retardation while a normal 18-year-old who suffers the same damage in a similar manner may not, although the degree of impairment in intellectual functioning and adaptive skills may be identical in both instances.

Trial evidence of defendant's mental retardation

"'Mild' mental retardation is typically used to describe people with an IQ level of 5055 to approximately 70." *Atkins*, 536 U.S. at 309 n.3, 122 S.Ct. at 2245 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, pp. 4243 (4th ed. 2000)).

The jury learned of defendant's purported mental retardation at the sentencing phase through the testimony of defense expert, Dr. E.H. Baker, a licensed psychologist practicing in Monroe, Louisiana. Dr. Baker evaluated defendant using a battery of tests, including the Wechsler Adult Intelligence Scale, Third Edition (WAISIII), and the Wechsler Memory Scale,

Third Edition; the Minnesota MultPhasic Personality Inventory, Second Edition (MMPI2). In making his assessment, Dr. Baker also reviewed a physical exam performed on defendant by Dr. Bruce Wheeler dated April 3, 2005 and another dated September 13, 1995. In addition, Dr. Baker reviewed medical records from October 1994 from Greer Neurosurgery Clinic, and various medical records from Glenwood Regional Medical Center. Dr. Baker looked at a psychological memo provided by Dr. Frederick Salter dated June 29, 2004, as well as defendant's school records from Monroe City Schools. Finally, Dr. Baker reviewed the psychiatric reports of the sanity commission doctors appointed in this case, Dr. Frank Weinholt, whose report is dated August 21, 2001, and Dr. George Seiden, whose report is dated March 19, 2001.

Dr. Baker explained that the WAISIII tests cognitive or intellectual functioning, and from that test, he obtained an IQ score for defendant. According to his findings, "[t]he full scale score came out in the borderline range of intellectual functioning and that's borderline mental retardation." When asked if defendant is mentally retarded, Dr. Baker disclosed:

> He fits in the definition of the AAMR definition of mental retardation. The fact that his full scale score was a 73 puts him on the point score being in the borderline range.

Dr. Baker further broke down defendant's IQ score into its component elements, indicating that defendant's "verbal side came out to be a 68" which

suggested that defendant was functioning in the mild mentally retarded range as to his verbal skills. On the other hand, with respect to his perceptual organization, defendant scored 78, indicating that he "functions better if he's doing hands-on stuff." Dr. Baker interpreted defendant's scores to mean that: "He is going to be able to look at something and reason and problem solve that better just by piecing it together than he is by listening to things.... So he could work on equipment, for instance, and do stuff like that much better than he can deal with people in talking with them."

Defendant's memory was not impaired at all and he scored in the low normal range insofar as his ability to recall information. However, the MMPI results suggested to Dr. Baker that defendant has a lot of mental confusion, which may be attributable to a psychotic disorder. Dr. Baker also concluded that defendant's confusion was partly a product of his alcohol and cocaine dependence, both of which would be in remission because of his incarceration. Dr. Baker referred to defendant's "K scale" of the Wiggins Social Desirability Scale on which defendant's score for defensiveness could be interpreted as an inability to deal with stress. Moreover, the MMPI suggested some antisocial features to defendant's personality, which Dr. Baker would not rate as rising to the level of a fullblown personality disorder, but nevertheless, exhibiting some traits of antisocial behavior.

However, Dr. Baker was constrained to acknowledge that as to the "variable response inconsistency scale,"

the so-called "lie scale," or "F scale," those results were elevated, suggesting that defendant was exaggerating. Dr. Baker admitted that defendant's "validity scores" were "quite unusual," although Dr. Baker soft-pedaled the scores by attributing them to defendant putting forth an effort at "attempting not to look crazy." Yet, Dr. Baker contradicted that assessment when he disclosed that defendant's "T score" was an "89 which says he was exaggerating. He was definitely trying to look bad because those are items that even people who are hospitalized don't generally endorse. But when I look also at the lie scale and it's elevated, then yes, I think he was lying but I think he doesn't know how to go about lying properly."

Notwithstanding the overt suspicion that malingering tainted defendant's scores, derived from testing performed a mere five days before jury selection of his capital trial began, his full scale score of 73 falls within a possible margin of error of four points that could place his actual IQ below 70, the line demarcating mild mental retardation. See *Williams*, 011650 pp. 2324, n.26, 831 So.2d at 85354 ("Thus, an IQ of 70 could range from 66 to 74 assuming an SEM [standard error of measurement] of 4.").

On cross-examination, the prosecutor suggested that the numerous times defendant had repeated grades did not necessarily indicate borderline functioning abilities, and reminded Dr. Baker that there was evidence that defendant missed one year of school as a child because of rheumatic fever, and defendant also

had to repeat grades because of excessive absenteeism.

State's rebuttal case: Dr. George Seiden

Following defendant's penalty phase of the case in which he claimed mental retardation as a complete bar to the death penalty, the State called in rebuttal Dr. George Seiden, whom the trial court accepted as an expert in psychiatry and forensic psychiatry. Dr. Seiden testified that he had interviewed defendant and reviewed the same reports and medical records reviewed by the defense expert, Dr. Baker, as well as Dr. Baker's test results and report. Dr. Seiden testified that the head injury defendant sustained in 1994 did not result in any mental capacity dysfunction, nor did defendant suffer from any posttraumatic stress disorder as a result of that beating. Dr. Seiden observed that the CT scans of defendant's brain following that injury revealed that defendant experienced bleeding in the tentorium cerebelli, which is the area of the brain that is involved primarily in balance and coordination, with some role in memory. Dr. Seiden stressed that the area of defendant's brain injury did not involve executive functioning or impulse control that would be the frontal cortex which showed no injury in defendant's medical records.

Dr. Seiden testified that, upon his review of defendant's IQ test results, he did not find defendant mentally retarded. Defendant's full scale IQ of 73 is not recognized within the range for mild mental

retardation (5570). An IQ of 73 is in the range of borderline intellectual functioning which is above mild mental retardation. Dr. Seiden explained that the measure of IQ can be affected by all sorts of things, for example, if someone takes an IQ test when they are sick, the test score will probably be lower. Similarly, if the person being tested is depressed, the IQ could be 10 to 15 points lower than when that individual is not depressed.

Dr. Seiden also addressed the validity components of defendant's MMPI test as presented on the three validity indicators, the L, F, and K scales. According to Dr. Seiden, the "larger the difference between the F scale and the K scale, the greater the likelihood that the person is exaggerating the extent of their disturbance." The MMPI is a test of 567 true/false questions, computer-scored. Of the 10 clinical scales tested by the MMPI, the computer breaks out the scores into "obvious versus subtle" in five of those scales. Dr. Seiden gave the example that some test questions asked clearly relate to depression as to which "anyone taking the test will be able to know that that has something to do with depression. But there are going to be other questions in there that the general public doesn't know [have] something to do with depression. Consequently, when there is a big difference between the obvious scores and the subtle scores, that is an indication of exaggeration." Dr. Seiden noted that on defendant's MMPI, his depression scale showed an obvious score of 76, and a subtle score of only 48. Dr. Seiden found that to be a significant disparity, and elaborated:

> [T]here is a pretty big range in between them. What's called the hysteria scale which measures certain physical complaints, emotional ability, dramatic presentations, those kinds of things. His obvious score is 103, almost off the scale. His subtle score is 43, actually in the low end of normal, big, big difference. In every one of the scales where there is an obvious versus the subtle, his obvious is significantly higher. Four (4) out of the five (5) [scales on defendant's MMPI] is significantly higher, there's one, the mania scale where there's only a 7 point difference. So he's not trying to show himself as having energy but in the other four (4) scales, big differences between obvious and subtle. Another indication of exaggeration on his presentation.

Dr. Seiden further opined that defendant does not meet the Louisiana definition of mental retardation, because he was never diagnosed as mentally retarded before age 18. Moreover, even assuming that defendant's 1994 brain injury, impacted his IQ, that would mean that before the injury (which occurred when defendant was age 32), his IQ would have been even higher. Thus, "it's impossible that prior to the age of 18, he would have had an IQ that would have been in the range of mental retardation."

Moreover, the jury heard defendant's own account of his actions after the murder, where he washed the blood from the drinking glass and the knife he used to

kill Mrs. Brinson, and he disabled the kitchen telephone. Such organized behavior to cover his tracks, suggests a level of intellectual awareness of right from wrong, and could have formed the basis for the jury to determine that defendant's adaptive skills were not retarded. Furthermore, two experts, one for the defense and one for the state, testified that defendant's 1994 traumatic brain injury did not result in brain damage. Dr. Wheeler and Dr. Seiden opined that the 1994 head injury did not result in any mental capacity dysfunction.

Under these circumstances, appellate counsel's argument that defendant qualifies as mentally retarded due to the traumatic brain injury is without merit. Likewise, counsel's argument that Louisiana's definition violates the defendant's Equal Protection rights because it arbitrarily sets the age of 18 as the onset requirement is rendered moot without any evidence whatsoever that the 1994 head injury caused defendant to have, so-called, adult-onset mental retardation. Defendant's school records do not support defendant's contention of mental retardation and his test scores, as fully presented to the jury, were similarly unpersuasive because of substantial questions raised about malingering. Consequently, the jury decided that defendant did not carry his burden of proof to establish by preponderance of evidence that he suffered from mental retardation to render him exempt from capital punishment under *Atkins*. La. C.Cr. P. art. 905.5.1. Thus, by its unanimous verdict, defendant's jury found that he was not mentally

retarded. Defendant's contentions of mental retardation are without merit.

Competency to Stand Trial

In this assignment of error, the defense contends that the trial court abused its discretion by concluding that he was competent to proceed to trial. Appellate counsel suggests that the trial court not only erred by finding defendant competent to proceed following the November 29, 2001 sanity hearing, but also erred by failing to reexamine defendant in the four intervening years between his evaluation by the sanity commissioners and the trial. The examination of the defense psychologist, Dr. E.H. Baker, was conducted on April 6, 2005, i.e., five days before jury selection. Dr. Baker suggested that defendant was "experiencing moderate to severe emotional distress characterized by fearfulness, hopelessness, and dysphoria ... and may be, in fact, losing his mind."

In *State v. Carmouche*, 010405, pp. 2931(La. 05/14/02), 872 So. 2d 1020, 10411042, this Court set forth the legal standard for determining whether a criminal defendant is competent to stand trial as follows:

> A criminal defendant has a constitutional right not to be tried while legally incompetent. *Medina v. California*, 505 U.S. 437, 449, 112 S.Ct. 2572, 2579, 120 L.Ed.2d 353, 36566 (1992) (quoting *Drope v. Missouri*, 420 U.S. 162, 173, 95 S.Ct. 896, 904, 43

L.Ed.2d 103, 114 (1975)). A state must observe procedures adequate to protect a defendant's right not to be tried while incompetent, and its failure to do so deprives the defendant of his due process right to a fair trial. *Id.* (quoting *Drope*, 420 U.S. at 172, 95 S.Ct. at 904, 43 L.Ed.2d at 113); *Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 842, 15 L.Ed.2d 815, 822 (1966).

Louisiana's statutory scheme for detecting mental incapacity jealously guards a defendant's right to a fair trial. *Nomey*, 613 So.2d at 161 (quoting *State v. Rogers*, 419 So.2d 840, 843 (La.1982)). In Louisiana, "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." La. C.Cr. P. art. 641; see also *Nomey*, 613 So.2d at 161. Our law also imposes a legal presumption that a defendant is sane and competent to proceed. LSA R.S. 15:432; *State v. Bridgewater*, 00-1529, p. 6 (La.1/15/02), 823 So.2d 877, 888; *Martin* at p. 1, 769 So.2d at 1169; *State v. Armstrong*, 94-2950, p. 4 (La.4/8/96), 671 So.2d 307, 309; *State v. Silman*, 95-0154, p. 7 (La.11/27/95), 663 So.2d 27, 32. Accordingly, the defendant has the burden of proving by a preponderance of the evidence his incapacity to stand trial. *State v. Frank*, 961136, p. 1 (La.10/4/96), 679 So.2d 1365, 1366 (citing

Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)); *Armstrong* at p. 4, 671 So.2d at 309; *Silman* at p. 7, 663 So.2d at 32. A reviewing court owes the trial court's determinations as to the defendant's competency great weight, and the trial court's ruling thereon will not be disturbed on appeal absent a clear abuse of discretion. *Bridgewater* at p. 6, 823 So.2d at 888; *Martin* at p. 1, 769 So.2d at 1169. Specifically, the appointment of a sanity commission is not a perfunctory matter, a ministerial duty of the trial court, or a matter of right. *Martin* at p. 1, 769 So.2d at 1169; *State v. Nix*, 327 So.2d 301, 323 La.1975). It is not guaranteed to every defendant in every case, but is one of those matters committed to the sound discretion of the court. *Martin* at p. 1, 769 So.2d at 1169; *Wilkerson*, 403 So.2d at 658; Nix, 327 So.2d at 323. The Louisiana Code of Criminal Procedure provides that a court shall order a mental examination of a defendant and accordingly appoint a sanity commission when it "has reasonable ground to doubt the defendant's mental capacity to proceed." La. C.Cr. P. art. 643. Reasonable ground in this context refers to information which, objectively considered, should reasonably raise a doubt about the defendant's competency and alert the court to the possibility that the defendant can neither understand the proceedings, appreciate the proceedings' significance, nor rationally aid

> his attorney in his defense. *State v. Snyder*, 981078, p. 24 (La.4/14/99), 750 So.2d 832, 851 (quoting *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir.1980)). In the exercise of its discretion, the court may consider both lay and expert testimony before deciding whether reasonable grounds exist for doubting the defendant's capacity to proceed and ruling on the defendant's motion to appoint a sanity commission. *Martin* at p. 2, 769 So.2d at 1169; *Silman* at p. 7, 663 So.2d at 32.
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> In evaluating the legal capacity of the criminally accused, we have stated that the consideration in determining whether the defendant is fully aware of the nature of the proceeding include:
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> Whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and consequences of conviction. *State v. Bennett*, 345 So. 2d 1129, 1138(La. 1977).

This Court has stated that the facts to consider in determining the defendant's ability to assist in his defense include:

> Whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of the witnesses and inform his lawyer of any distortions or misstatements, whether he has the ability to make simple decisions in response to well-explained alternative; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial; see also *State v. Snyder*, 981078, p. 5 (La. 4/14/04), 874 So. 2d 739, 742.

Here, defendant placed the issue of his sanity before the court only once, by filing an application for appointment of a sanity commission on December 15, 2000. Although the defense motion only made general reference to a "mental disease or defect," the court held a hearing on January 10, 2001 at which time defendant's sister, Vera Gibson Walker, testified on defendant's behalf. Walker related to the court the circumstances of defendant's 1994 beating, and its impact on his mental capacity, from her observation. At the conclusion of that hearing, the defense introduced defendant's 1994 medical records from Glenwood Regional Medical Center, and the trial court ordered a sanity commission to examine defendant.

The court appointed Dr. George Seiden and Dr. Frank Weinholt to the sanity commission.

Dr. Seiden's report dated March 19, 2001 establishes that, in his opinion, defendant "has the ability to consult with his attorney with a reasonable degree of rational understanding and currently has a rational and factual understanding of the proceedings against him." Dr. Seiden further elaborated that defendant met all of the Bennett criteria.

Dr. Weinholt's report is dated August 21, 2001, but apparently was not filed with the trial court until November 7, 2001. Dr. Weinholt found "no suggestion that [defendant's] previous head concussion has resulted in any loss of ability to assist his attorney presently. His review of past legal problems confirms he has a good working knowledge of the legal system and how it works." In addition, Dr. Weinholt concluded that defendant understood right from wrong at the time of the offense.

On November 29, 2001, the trial court held a sanity hearing, and proceeded on the question of competency based on the reports of the two doctors appointed. Based on his review of the findings of the sanity commission, as well as his review of the 1994 medical records introduced from Glenwood Regional Medical Center, the judge found defendant competent to stand trial. The trial court recited the Bennett criteria and found defendant capable in each regard. The judge further noted: "The doctors tell me, and that's the evidence I had to go on, that they have no reason to

believe that his mental condition is apt to deteriorate under the stress of trial." Accordingly, pursuant to La. C.Cr. P. art. 647, the court found defendant competent to proceed to trial.

Notably, the defense voiced no objection to the trial court's finding of competence to proceed to trial. More importantly, the defense never requested that defendant be examined yet again on the question of competency. Appellate counsel posits that the trial court should have been put on notice by virtue of Dr. Baker's report that defendant had an apparent sense of "losing his mind," such that it should have reopened the sanity commission, *sua sponte*.

While Dr. Baker's testing of defendant occurred on April 6, 2005, Dr. Baker's report was not submitted until April 20, 2005, which would have been nine full days into jury selection of defendant's capital trial. The dilatory submission of Dr. Baker's report was a subject of some consternation among the parties and the court, and a constant subject throughout voir dire breaks. Defense counsel was regularly scolded by the judge to get his expert to submit his report. In fact, by the time Dr. Baker finally submitted his report, the trial judge had the opportunity to observe and assess, firsthand, defendant's demeanor for nine days straight under the stress of trial, and apparently detected no mental difficulties to warrant intervention. Under these circumstances, the determinations of the trial judge as to competency of defendant to stand trial are entitled to great weight on review, and will not be overturned absent an abuse of discretion. *State v.*

Brogdon, 426 So.2d 158, 167 (La. 1983); *State v. Rochon*, 393 So.2d 1224, 1228 (La. 1981).

We find that the record supports the trial court's findings that the defendant was aware of his surroundings; the proceeding in which he was participating; and he understood the charges against him and the consequences of these charges. Thus, the record fully supports the conclusion that the defendant was competent to stand trial.

Admissibility of Statement; Waiver of Miranda Rights

In this assignment of error, defendant argues that the statement made by him occurred without a knowing and voluntary waiver of his Miranda rights, and the trial court's ruling allowing admission of this statement is error.

It is well-settled that for a confession or inculpatory statement to be admissible into evidence, the State must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menace, threats, inducements, or promises. LSA R.S. 15:451; *State v. Simmons*, 443 So.2d 512 (La.1983). The State must also establish that an accused was advised of his constitutional rights, state and federal, and that he understood and knowingly waived those rights. State v. Simmons, supra.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United State Supreme Court

recognized the coercive atmosphere created by police custody and established a procedural mechanism to safeguard the exercise of a defendant's Fifth Amendment rights. Before questioning a suspect in custody, Miranda requires that law enforcement officials inform the suspect that he has the right to remain silent, that his statements may be used against him at trial, that he has a right to an attorney, and that if he cannot afford an attorney, one would be appointed for him.

The admissibility of a confession is, in the first instance, a question for the trial court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession are accorded great weight and will not be overturned unless they are not supported by the evidence. See *State v. Jackson*, 381 So.2d 485 (La. 1980); *State v. Patterson*, 572 So.2d 1144, 1150 (La. App. 1st Cir.1990), writ denied, 577 So.2d 11 (La.1991); State v. Sanford, 569 So.2d 147, 150 (La. App. 1st Cir.1990), writ denied, 623 So.2d 1299 (La.1993). Whether or not a showing of voluntariness has been made is analyzed on a case by case basis with regard to the facts and circumstances of each case. *State v. Benoit*, 440 So.2d 129, 131 (La.1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. *State v. Hernandez*, 432 So.2d 350, 352 (La. App. 1st Cir.1983).

Low intellect, moderate mental retardation or diminished mental capacity does not, per se, vitiate capacity to make a free and voluntary statement or a

knowing and intelligent Miranda waiver. *State v. Brooks*, 933331, pp. 1117(La. 1/17/95), 648 So.2d 366, 37375; *State v. Benoit*, 440 So.2d 129, 131 (La. 1983); *State v. Lindsey*, 404 So.2d 466, 472 (La. 1981). Voluntariness is determined on a case by case basis, under a totality of the circumstances standard. *State v. Brooks*, 648 So.3d at 372; *State v. Benoit*, 440 So.2d at 131.

In the present case, the trial court held a hearing on defendant's motion to suppress his confession. The state presented testimony from Detectives James Clark and Doug Tarver of the Monroe Police Department. Det. Clark testified that he arrested defendant on October 2, 2000 pursuant to an arrest warrant. The detectives advised defendant of his Miranda rights and had defendant follow along on a waiver of rights form. After the officers explained his rights to defendant, defendant initialed and signed the waiver form and agreed to give a voluntary taped statement, which was about one hour in duration. Defendant's statement was audio-taped, and a transcript of that interview was introduced at the motion hearing.

In the transcript of the recorded interview, Detective Clark confirmed that defendant had been advised of his rights, and reread the rights waiver form aloud. Defendant confirmed his initials and signature on the rights waiver form. During the interview, defendant never requested an attorney. In addition, the officers provided defendant with something to eat and drink, and he was given opportunities to use the restroom as

needed. Both officers testified that defendant did not appear to be under the influence of any alcohol or other substance. Defendant assured the officers that he did not feel hung-over or confused, and that he understood his rights. Moreover, both officers reiterated that they exerted no threats, promises or coercion to get defendant to give a statement.

At the hearing on the motion to suppress, the State introduced the sanity commission reports of Dr. George Seiden and Dr. Frank Weinholt as further evidence that defendant's waiver of rights was knowing, intelligent and voluntary. Following the testimony, the trial court found defendant's waiver of his rights was knowing and intelligent, free and voluntary, and denied defendant's motion to suppress.

Defendant's custodial statement appears to be the product of his voluntary waiver of his constitutional rights, which he repeatedly indicated that he fully understood. No lack of understanding or voluntariness is demonstrated, and the trial court's ruling denying defendant's motion to suppress his statement appears well-founded. This assignment of error lacks merit.

Challenge for Cause (*Witherspoon v. Illinois*)

The Sixth Amendment of the United States Constitution guarantees the accused the right to a trial by an impartial jury. La. Const. art. I, § 17 guarantees the right to full voir dire examination of prospective jurors and to challenge those jurors peremptorily. The number of challenges is fixed by

law. This Court in *State v. Allen*, 951754 (La.9/5/96), 682 So.2d 713, 72223, has stated:

> Therefore, when a defendant uses all of his peremptory challenges, a trial judge's erroneous ruling depriving him of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of the conviction and sentence. [Citations omitted].

La. Const. art. I, § 17(A) provides that a defendant has a right to challenge jurors peremptorily, with the number being fixed by law. La. C.Cr. P. art. 744 [5] provides the defendant in a death penalty case with twelve peremptory challenges. Therefore, when a defendant uses all of his peremptory challenges, a trial judge's erroneous ruling depriving him of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of the conviction and sentence. *State v. Jacobs*, 99-1659, p. 5 (La.6/29/01), 789 So.2d 1280, 1284; *State v. Cross*, 93-1189 (La. 6/30/95), 658 So.2d 683, 686; *State v. Maxie*, 93-2158 (La. 4/10/95), 653 So.2d 526, 534; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280. A defendant must object at the time of the ruling on the refusal to

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[5] La. C.Cr. P. art. 744 provides in pertinent part: "The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw there from, and to the law applicable to the case."

sustain a challenge for cause of a prospective juror. La. C.Cr. P. art. 800.

Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. *Cross*, 93-1189 at 1192, 658 So.2d at 686; *State v. Robertson*, 92-2660 at 34, 630 So.2d at 1280; *State v. Ross*, 623 So.2d 643, 644 (La. 1993). Thus, "[t]o prove there has been reversible error warranting reversal of the conviction and sentence, defendant need only show (1) erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges." *Id.* The trial judge is vested with broad discretion in ruling on challenges for cause, and his ruling will only be reversed when review of the entire voir dire shows the trial judge abused his discretion. *Robertson*, 92-2660 at 2663, 630 So.2d at 1281.

The grounds for which a juror may be challenged for cause are set forth in La. C.Cr. P. art. 797, which sets forth in pertinent part:

> La. C.Cr. P. art. 797. Challenge for cause
>
> The State or the defendant may challenge a juror for cause on the ground that:
>
> * * *
>
> (2) The juror is not impartial, whatever the cause of his impartiality.

* * *

> (4) The juror will not accept the law as given to him by the court.

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *State v. Manning*, 03-1982 p. 38 (La.10/19/04), 885 So.2d 1044, 1082, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). *Witt* clarified the earlier Supreme Court pronouncement in *Witherspoon v. Illinois, supra.*, that a prospective juror who would vote automatically for a life sentence was properly excluded by the trial court. La. C.Cr. P. art. 798(2)(a) and (b) incorporate the standard of Witherspoon, as clarified by Witt.

It is good cause for challenge on the part of the State, but not on the part of the defendant, that

> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known:
>
> (a) That he would automatically vote against the imposition of capital punishment without

> regard to any evidence that might be developed at the trial of the case before him;
>
> (b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; ...

Applying these precepts to the responses of these prospective jurors challenged and about whom defendant now complains, the record fairly well supports the trial court's decision to deny the defense's cause challenges against the prospective jurors.

In this assignment of error, defendant argues that the trial court erroneously allowed the State's cause challenges as to two prospective jurors whose voir dire examinations revealed that they could consider imposing the death penalty under the appropriate circumstances. Defendant claims that the jurors at issue in this part expressed, at most, "mere generic queasiness" to capital punishment.

A prospective juror is properly excluded for cause because of his/her views on capital punishment when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *State v. Sullivan*, 596 So.2d 177 (La. 1992), rev'd on other grounds sub nom. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078,

124 L.Ed.2d 182 (1993). The basis of exclusion under La. C.Cr. P. art. 798(2)(b), which incorporates the standard of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d. 776 (1968), as clarified by *Witt*, is that the juror's views "would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath." *Witt, supra. Witherspoon* further dictates that a capital defendant's rights under the Sixth and Fourteenth Amendments to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, 88 S.Ct. at 1777. Moreover, notwithstanding La. C.Cr. P. art. 800(B), which states that a defendant cannot complain of an erroneous grant of a challenge to the State "unless the effect of such a ruling is the exercise by the State of more peremptory challenges than it is entitled to by law," the United States Supreme Court has consistently held that it is reversible error, not subject to harmless-error analysis, when a trial court erroneously excludes a potential juror who is *Witherspoon*-eligible, despite the fact that the state could have used a peremptory challenge to strike the potential juror. *Gray v. Mississippi*, 481 U.S. 648, 664, 107 S.Ct. 2045, 2054, 95 L.Ed.2d 622 (1987); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); *State v. Craig*, 95-2499 (La. 5/20/97), 699 So.2d 865 (unpub. appx. at 7). To determine the correctness of rulings on cause challenges, a review of the prospective juror's voir dire as a whole must be undertaken. *State v. Lee*, 93-2810, p. 9 (La. 5/23/94),

637 So.2d 102, 108 (trial judge is afforded great discretion in determining whether cause has been shown to reject a prospective juror); *State v. Williams*, 457 So.2d 610, 613 (La. 1984); *State v. Hall*, 616 So.2d 664, 669 (La. 1983).

In the instant case, the state used only five of its allotted peremptory challenges during jury selection. However, as set out above, the state's failure to exhaust peremptory challenges does not preclude review of the trial court's rulings on individual *Witherspoon* challenges. A review of the record demonstrates that the trial judge did not abuse his discretion in granting the state's challenges for cause as to the two prospective jurors in dispute.

James Jones

Jones was questioned in Pool 1, Panel 1. When the prosecutor began the initial death-qualifying inquiries, Jones disclosed his feelings on the subject of capital punishment:

> Well in my personal opinion one of the Ten Commandments is thou shall not kill.... If the defendant is guilty and he did kill, if I sentence him to death, would I ... would I be killing?

Jones conceded that those feelings might interfere with his ability to render a death verdict.

When questioned by defense counsel, Jones ranked himself as a "four" on a scale of one to ten, with one being the least favorable to the death penalty. He further admitted that he did a report on capital punishment at the age of twelve, and that he has had "mixed feelings about it with my religion ever [illegible] since." When counsel queried whether Jones thought that innocent people may have been put to death, Jones replied: "Yes, sir. I do believe so, but I also believe there's been guilty people walk away though."

Counsel sought to rehabilitate Jones, who claimed: "I feel like I could consider both sides in making my decision." But when asked if he could vote for the death penalty, Jones expressed his true feelings: "I'm not sure. That's just a touchy subject with me. I mean I'd have to have all of the facts, but I wouldn't want to be judged for something like that." Jones confirmed his Christian beliefs as the possible source of his hesitancy in serving on a jury: "Judge not or you shall be judged."

Thereafter, the State issued a challenge for cause as to Jones, and counsel objected that Jones had expressed a willingness to consider both verdicts. However, because Jones did not indicate expressly that he could vote for both, the court decided to bring him back for individualized voir dire. The judge explained again what would be required of him, if he was chosen for this capital jury. Jones admitted that "my beliefs might interfere with my duty.... I have very ... very strong feelings about that I'll be clear about. Yes, sir." Jones reiterated that he felt strongly that he did not

want to be responsible for taking someone's life. The judge then asked Jones, if the defendant were found guilty of first degree murder, would he vote his beliefs and "always vote life," thereby depriving the state from seeking the death penalty. Jones replied: "Correct. I don't think a jury could make me change my beliefs on that because I would have to live with that for the rest of my life." After the judge explained the evidence that would be presented at a possible penalty phase with an aim toward voting for the appropriate penalty, death or life, Jones observed: "I don't think that I would be fair to the state if he was convicted and found guilty."

Afterwards, the State renewed its cause challenge as to Jones, which the trial court granted with the following remarks: "[I]t's clear to me this has weighed heavily on his mind. His facial expression, voice tones clearly shows the Court that his views would interfere with his willingness and ability to follow the law and that he would never be able to vote for the death penalty."

To the extent that Jones voiced such strong religious beliefs against the death penalty, and exhibited a clear aversion to sitting in judgment of his fellow man, the state was justified in challenging him for cause. La. C.Cr. P. art. 798(2)(b) provides that a prospective juror is properly excused when his attitude toward the death penalty would prevent, or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath. We find

no error in the trial court granting the State's challenge for cause.

Jessica Hearne

Hearne was questioned in Pool 1, Panel 2. Hearne's responses to the trial court's questions on the death penalty were decidedly equivocal:

> Q: Ms. Hearne, regardless of the evidence would you be unable to even consider imposing the death sentence?
>
> A: I'm not sure.
>
> Q: Okay. Would you automatically vote for life imprisonment regardless of what the evidence might show during the penalty phase?
>
> A: I'm just not sure.
>
> Q: Do you have conscientious scruples against infliction of capital punishment?
>
> A: Against myself making the decision for someone else's life, yes.

The judge continued by explaining to Hearne that both sides want a jury that can follow the law and be fair and impartial, but that the state was looking for jurors who could vote guilty of first degree murder, and then, vote for the death penalty. When the judge

asked Hearne if she could do that, she waffled: "I've never had to do that before so I can't ... I can only tell you that I ... I would not like to do that." The judge asked again:

> Q: [W]hat I am asking you is, and you're the only person that knows this, when you search inside of you, can you fairly consider all of the evidence and vote for ... depending on the evidence and what you think is appropriate, for life or death. Or do you think that your feelings would interfere with you fairly doing it?
>
> A: That's possible.

When the judge asked Ms. Hearne whether she could be fair and impartial during the penalty phase, Ms. Hearne replied, "I could try." While admitting that she had conscientious scruples against the infliction of capital punishment, Ms. Hearne suggested that this would not preclude her from ever voting for the death sentence "under any circumstances whatsoever." Hearne conceded that the determination of guilt or innocence did not bother her as much as having to decide "whether someone should live or die."

The prosecutor suggested to Hearne that this was not an extreme first degree murder "not a Jeffrey Dahmer or an Adolph Hitler. But it's your firm belief that your feelings would substantially impair you from rendering a death verdict?" Hearne replied, "That's right."

Under defense questioning, Hearne stated "It's not necessarily the death penalty itself that I have a problem with. It is my deciding that someone should or shouldn't have the death penalty.... I just don't want to be the one to mete out judgment on another person." On the defense's death penalty scale of one to ten, Hearne ranked herself as a "five." Hearne reiterated that she would not want to take part in a decision about the death penalty, and that she "would respect the other's opinions, but it wouldn't change mine.... I am strongly opposed as I stated earlier to having someone's life in my own hands.

After the state challenged Hearne for cause, defense counsel stated, "I don't wish to call her back" for further questioning. The court granted the state's cause challenge with the following observations: "Ms. Hearne told us in numerous phrases, terms and by her demeanor that sure, some people deserve it, she doesn't want to do it, she's not going to do it. And this court is convinced that in any case she sat on, she would never impose the death penalty." La. C.Cr. P. art. 798(2)(b) supports the State's challenge as to Hearne. Nothing presented by defendant persuades this Court that the judge abused his discretion in granting the state's cause challenge as to Hearne.

Challenges for Cause Pro-death jurors (Reverse-*Witherspoon*)

In this part, defendant complains that the trial court erroneously denied his challenges for cause as to three prospective jurors whose voir dire examinations

revealed that they would not genuinely consider a life sentence. In defendant's view, the court's rulings resulted in a death-prone jury.

In a "reverse Witherspoon" situation, the basis of the exclusion is that a prospective juror "will not consider a life sentence and ... will automatically vote for the death penalty under the factual circumstances of the case before him ...". *Robertson*, 19922660 p. 8, 630 So.2d at 1284. The "substantial impairment" standard applies equally to "reverse *Witherspoon*" challenges. *Manning*, 20031982 at 38 n.22, 885 So.2d at 1083 n.22. Thus, if a potential juror's views on the death penalty are such that they would prevent or substantially impair the performance of his duties in accordance with his instructions or oaths, whether those views are for or against the death penalty, he should be excused for cause.

Thomas Hutson

Defendant avers that Hutson, who believed in an "eye for an eye," would automatically vote for death in a case of premeditated murder. A review of the voir dire record as a whole reveals that Hutson was questioned in Pool 2, Panel 2, and his responses to both the judge and the prosecutor were balanced and fair. While he admitted in response to one of the prosecutor's inquiries that he believed in the concept of an "eye for an eye," when the state asked where Hutson fell on the death penalty continuum: "strong advocate," "a weak advocate," or "somewhere in the middle." Hutson placed himself in the middle. He assured the state

that he would consider all of the mitigating evidence before making a sentencing decision.

When defense counsel asked Hutson to elaborate on his view of the death penalty, Hutson suggested: "If a person has committed a serious crime such as murder and is guilty beyond that total shadow of a doubt, then I think he should be sentenced to death." Counsel then asked Hutson if he thought mitigating circumstances should allow a person convicted of premeditated murder to escape the death penalty, and Hutson replied, "[d]epending on what they actually were." At this point, counsel gave Hutson a convoluted hypothetical involving a "lying in wait" type of murder, and then asked if Hutson thought mitigating circumstances should apply to such a case. Hutson's reply was no. Thereafter, counsel reworded his question, and Hutson indicated that he could consider mitigation evidence. Finally, after counsel asked multiple questions without giving Hutson a chance to respond on the subject of whether he would consider mitigation, a befuddled Hutson replied: "I'm not real sure how to answer that. No, I would still like to see what the circumstances behind it was before I actually made up my mind confirming it. Hutson did not waver from his opinion stating that mitigation would still be needed for consideration even in a case of premeditated murder. Further, Hutson reiterated that "there are some circumstances I wouldn't vote for death."

The trial judge denied defense counsel's challenge for cause as to Hutson, with the following observations:

> The Court observed his entire testimony and observed his facial expressions and his voice tones. He's a very soft-spoken person.... I wrote a bunch of [notes]. He said to my questions in particular that he could consider both aggravating and mitigating circumstances and that he could consider both life or death. Now in your hypo, and he came back and cleared that up, based on that hypo and only on that hypo with no other evidence and no other mitigating or aggravating evidence, that he would impose the death penalty, but even then he'd put up a stronger burden on the state than they're required. The state is only required to prove beyond a reasonable doubt and not beyond a shadow of a doubt. And so even then he put a stronger burden on [the state] before he would impose death.... [H]is answers taken as a whole shows me that he's a very thoughtful person, that he will listen to both sides, and that based on the facts of the case ... he'll consider both mitigating and aggravating circumstances, he'll consider both the death penalty and life imprisonment, whether it be premeditated or not, and that there are some situations where he will give life and there are some situations where he'll give death depending upon the facts of the case.

Based on our review of Hutson's voir dire responses as a whole, and the trial court's candid assessment of his demeanor, no abuse of discretion is apparent in the

court's denial of this challenge for cause. See *Lee*, 932810 at 9, 637 So.2d at 108 (A trial judge is accorded broad discretion in ruling on cause challenges because he or she "has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys."). Since jury selection was completed before Hudson's name was called for further questioning, the defense was not required to use one of its peremptory challenges to excuse Hutson, and thereby waived any complaint about the trial court's ruling.

Rodney Traweek

Defendant complains that the trial court denied his cause challenge as to Rodney Traweek, who in defendant's view, would not "genuinely consider life imprisonment." A review of the record reveals that Traweek was questioned in Pool 1, Panel 4. Traweek's voir dire responses to the judge demonstrated an evenhanded approach to capital punishment. Likewise, Traweek indicated that he would "not necessarily" vote death automatically.

In response to defense counsel's questions, Traweek ranked himself as a "seven" on a scale of one to ten scale, with ten being most strongly in favor of the death penalty. When asked his opinion of retardation as a mitigating circumstance, Traweek responded:

> If it's proven evidence that that is an issue in a case, I would consider it. Now I would have

> to feel one hundred percent with the evidence that I heard to change my mind against the death penalty. I guess to put it easier I'd say it may go from a seven to about a four or a five.

When counsel broached the subject of whether the prospective jurors' religious beliefs impacted their views on capital punishment, Traweek indicated that he ascribes to the biblical "eye for an eye." Counsel asked whether Traweek extended that belief to a "life for a life," yielding the following personal perspective:

> In some cases I would believe that. I will say this. If I was sitting here and I was convicted of first degree murder, it would be better for me and my family for me to be sentenced to death because I wouldn't want my kids and my family to see me in prison the rest of my life.

Traweek clarified for counsel that his religious convictions did "not necessarily" dictate to him that the only appropriate response for murder would be to take the life of the perpetrator:

> There may be some situations that may have caused him to prevent that death or murder that I'd have to listen to and say had this not been the situation, it may not have happened. I'd just have to listen to all of the evidence. I'm about a seven, which means there's still some doubt or some ... something in me that

> might say the best punishment for him is the life imprisonment. The bottom line is to punish him. What would be the best punishment? If it's death, then it's death. If it's life imprisonment, to me it'd be life in prison.... [A]fter I heard all of the evidence from both sides, then I would decide. Could I give a man the life sentence. Yes. Could I see him in ... I mean the death sentence? Absolutely. Could I see him go to prison for life. Yes.

Traweek reiterated that if he were on trial for capital murder, "I wouldn't want to spend the rest of my life in prison. That would be the biggest punishment to me."

Counsel based his cause challenge as to Traweek on the following grounds:

> Although he for the most part gave right answers, when he got to the part regarding his belief in an eye for an eye and a tooth for a tooth he got very forceful."

The court denied the challenge, basing that ruling on stated reasons, including:

> I find that he is a very strongminded person ... [who] appears to be equal to giving life or death. With him he considers life imprisonment even worse of a punishment. But he said unequivocally to me and to Mr.

> Ruddick that he would listen and consider all of the mitigating factors and would be able in some cases [to] give a life sentence. And then if the situation warranted the death sentence, he would impose the death sentence.

Nothing in Traweek's voir dire as a whole suggests a leaning toward automatically imposing the death penalty. Accordingly, no abuse of discretion is apparent, and the trial judge properly denied the defense challenge for cause as to Traweek.

Neither the State nor the defense challenged Traweek peremptorily. However, defense counsel subsequently issued a peremptory backstrike to remove Traweek.

Kari Ellis

Defendant argues that Kari Ellis should have been struck for cause based on her predisposition in favor of the death penalty. A review of the record reveals that while Ellis was questioned in Pool 2, Panel 4. While Ellis's answers to the judge and the prosecutor reflected a neutral position regarding capital punishment, under defense questioning, Ellis disclosed the sentiments for which counsel sought to remove her:

> I have always been for the death penalty and I am probably more convinced that it is more of the way to go in some instances than

> maybe what I was whenever I was younger and a little bit more naive to what goes on.

Ellis conceded that she is "probably a little bit colder than what [she] used to be." In Ellis's view, "the world is not necessarily a nice place to live anymore." Ellis attributed her evolution on the subject of capital punishment:

> I live in the real world. I see you know, I read the paper, see the news much more than I did whenever I was younger. When I was younger I was much more naive and much more sheltered than what I am now that I'm out on my own and know what goes on in the world.

Ellis suggested that she while she has always favored the death penalty, she probably favored it a bit more than she did as a younger person, which appears to be what she was trying to tell counsel when she ranked herself as "about a seven" on a scale of one to ten in which ten would most strongly favor capital punishment. She added that the "mitigating factors would have to be very high before I would go with life over death."

Thereafter, defense counsel challenged Ellis for cause based on her strong views "in favor of the death penalty," and that mitigating circumstances would have to be "very, very strong for her to consider life." Counsel assessed that Ellis was "not a person that could keep an open mind regarding the penalty until

she heard everything because ... she would already be in favor of death when she started the penalty phase."

The trial court disagreed and denied the challenge for cause for the following reasons:

> I think Ms. Ellis was straightforward. If you looked at her earlier testimony about the media and everything else she tried to let us know what was inside her, she did not keep anything back, and she tried to answer the questions truthfully as the best she understood them. I have down here she's ... strong spoken but polite and has it all together, meaning that she can articulate herself well and her feelings. Here she clearly told me, after I explained it, she could follow the law and she could obey the Court's instructions, she could consider all of the mitigating factors and that she could vote for death or she could vote for life. And she committed to me, and I believed her, that she would not make a decision until she's heard all of the evidence.... Her testimony demonstrates to me that she has a willingness and ability to decide the case impartially and according to the law and the evidence and that her inclinations would not impair her at all.

That a juror has personal pre-dispositions towards the death penalty does not render her unfit for service on a capital jury if she is nevertheless willing to consider

both aggravating and mitigating circumstances in reaching a sentencing verdict on the basis of the evidence presented at trial. *State v. Higgins*, 03-1980, pp. 3031 (La. 4/1/05), 898 So.2d 1219, 1238; *State v. Lucky*, 961087, pp. 78 (La. 4/13/99), 755 So.2d 845, 850. That being the case, no abuse of discretion is apparent in the trial court's denial of the challenge for cause as to Ellis.

Ellis' name was never called for questioning in any of the subsequent rounds of general voir dire before completion of the jury panel. Accordingly, the defense did not have to use one of its peremptory challenges to excuse Ellis, and thereby waived on appeal any complaint about the trial court's ruling.

Batson Challenges

In this assignment of error, defendant contends that the trial court erred in finding that the defense failed to establish a prima facie case of discriminatory use of peremptory challenges by the State against three qualified African-American prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Specifically, defendant points to three peremptory challenges exercised by the state against African-American jurors: James Chapple, Umeka Hudson, and Percy Manning. The defense argues that because the State did not attempt to exclude any of these three jurors through cause challenges, the only apparent reason for challenging them peremptorily was their racial identity.

In *Batson*, the Supreme Court held that an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. The Supreme Court reaffirmed its position that racial discrimination by any state in jury selection offends the Equal Protection clause of the 14th Amendment in *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L.Ed.2d 196 (2005). Louisiana law codifies the Batson ruling in La. C.Cr. P. art. 795.[6] See also *State v. Snyder*, 1998-1078 (La. 9/6/06), 942 So.2d 484, rev'd on other grounds, *Snyder v. Louisiana*, U.S. , 170 L. Ed. 2d 175, 128 S. Ct. 1203 (2008).

If the defendant makes a prima facie showing of discriminatory strikes, the burden shifts to the state to offer racially-neutral explanations for the challenged members. If the race-neutral explanation is tendered, the trial court must decide, in step three of the Batson analysis, whether the defendant has proven purposeful discrimination. The race-neutral explanation need not be persuasive or even plausible. *Rice v. Collins*, 546 U.S. 333, 126 S.Ct. 969, 973974,

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[6] La. C.Cr. P. art. 795(C): No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

163 L.Ed.2d 824 (2006), quoting *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). It will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The ultimate burden of persuasion as to racial motivation rests with, and never shifts from, the opponent of the peremptory challenge. *State v. Tyler*, 970338, at 3 (La.9/9/98), 723 So.2d 939, 942, cert. denied, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999).

The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal. *Id.* at 4; see also, *State v. Juniors*, 032425, p. 28 (La.6/29/05), 915 So.2d 291, 316. When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. at 339, 123 S.Ct. at 1040.

The three-step *Batson* process which guides the courts' examination of peremptory challenges for constitutional infirmities has recently been described again by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine

> whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Internal quotations and citations omitted.]

Collins, 546 U.S. at 33637, 126 S.Ct. at 97374.

Ultimately, the jury seated in the instant case was composed as follows: nine white jurors, three black jurors; nine females and three males. The three alternate jurors were all white females. The defendant contends that the trial court erred in finding that the defense failed to establish a prima facie case of discriminatory use of peremptory challenges by the state against three qualified African-American prospective jurors in violation of *Batson*. Specifically,

defendant points to three peremptory challenges exercised by the state against African-American jurors: James Chapple, Umeka Hudson, and Percy Manning.

Chapple was questioned in Pool 1, Panel 3. R., Vol. IV, p. 817. A review of his responses suggest possible race-neutral reasons for the state's peremptory challenge, although never articulated as such by the state. For example, Chapple indicated that he had previously served on a criminal jury in a second degree murder case, but the case "settled [] before it really got started." He expressed no moral, personal, or religious impediments to capital punishment. Chapple disclosed that a friend of his from his school years had been murdered, but that event did not affect his opinion on the death penalty. In addition, Chapple disclosed to defense counsel that his cousin's son is mentally retarded. He subscribed to the concepts of mercy and redemption. Neither the state nor the defense challenged Chapple for cause. Thereafter, the state exercised a peremptory back-strike to excuse Chapple.

Umeka Hudson, age 26, was questioned in Pool 1, Panel 1. A review of Hudson's voir dire responses reveal possible race-neutral reasons upon which the state could have relied, although it was never called upon for such an articulation. For example, Hudson initially ranked herself as a "nine" on the defense's scale, with ten being most in favor of capital punishment. However, her next response indicated that she had n ver given any thought whatsoever to capital punishment before "[r]ight now." She felt that

there "possibly" had been executions where people who were not guilty were put to death. After the preliminary round of questioning, neither the state, nor the defense challenged Hudson for cause. Likewise, after general voir dire, neither the state nor the defense issued a cause challenge as to Hudson. Thereafter, the state exercised a peremptory strike to remove Hudson.

Although appellate counsel lists three African-American jurors in contention in the Batson portion of the appellate brief, in fact, at trial, the defense withdrew any objection pertaining to Manning. Notwithstanding trial counsel's withdrawal of his Batson objection with respect to Manning, appellate counsel took the position that "the court's specific ruling on the strike against Mr. Manning effectively rendered moot the issue of whether the defense's *Batson* objection included Mr. Manning." In addition, legitimate, verifiable, race-neutral reasons support the state's peremptory strike, foremost being that Manning admittedly socialized with one of the trial's defense attorneys, Louis Scott. Early on in the initial voir dire, Manning disclosed their acquaintance: "Mr. Scott, I know him. We frequent the same jazz club. And I'm thinking it may ... might cause a conflict of interest because I know him." In addition, Manning had confirmed that he had previous information about the facts of the case that he had gleaned from within the community, which he summarized as follows:

> That someone is dead. A lady. A white lady. Okay. And the alleged defendant was picked up for that murder.... And the reason why ... it has taken so long for it to come to court or, you know, was because they wanted to maybe try to establish or find out if he was crazy or sane or, you know, and it had to be determined by a court ... a judge to decide the state of mentality.... Well, they were saying in the ... community that a white lady is dead, a black guy did it, they're going to tar and feather him. Okay.

Manning further expressed that "whoever [committed the murder] should be held accountable for that because a life was lost needlessly." Manning pondered that "[i]t wouldn't have made me any difference if they hung him." Considering these responses, the state's decision not to challenge Manning for cause is not surprising. In the instant case, neither the numbers nor the facts support showing that the State based its peremptory challenge on race. Notwithstanding that the state did not articulate race-neutral reasons in this pre-Johnson landscape, the trial judge in the present case took a very active role in voir dire. His finding that no discriminatory purpose tainted the state's peremptory strikes is borne out by the record, and no abuse of discretion is apparent. Under the circumstances, defendant's *Batson* claims fail on the merits and no relief appears due.

Penalty Phase

In this assignment of error, defendant argues that the heinous, atrocious, and cruel aggravating factor is unconstitutionally vague and, even if construed as constitutional, the evidence presented in his case was insufficient to support a finding of this aggravator. Appellate counsel suggests that this Court reconsider its ruling in *State v. Hoffman*, 98-3118, pp. 3334 (La. 4/11/00), 768 So.2d 542, 57374, in which the Court held that a limiting instruction on heinousness could cure the constitutional infirmity of vagueness as to that aggravator.

For a crime to have been committed in an especially heinous or cruel manner, the evidence must support a finding of torture or pitiless infliction of unnecessary pain. *State v. Hoffman*, 98-3118, pp. 3334 (La. 4/11/00), 768 So.2d 542, 574; *State v. Hamilton*, 92-1919, pp. 1415 (La. 9/5/96), 681 So.2d 1217, 1226; *State v. Eaton*, 524 So.2d 1194, 121011 (La. 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 807, rehg. denied, 489 U.S. 1061, 109 S. Ct. 1332, 103 L. Ed. 2d 600 (1989); *State v. Brogdon*, 457 So.2d 616, 631 (La. 1984). To support a finding of heinousness, this Court has also held that the murder must be one in which the death was particularly painful and one carried out in an inhuman manner, so that the victim experienced great pain and was aware of his/her impending death. *State v. Castleberry*, 98-1388, p. 31 (La. 4/13/99), 758 So.2d 749, 774 (finding heinous nature of crime supported the death penalty given that defendant forced the victim to look at him

before beating him about the head with an iron skillet with such force that the skillet broke and then, finding the victim still alive, smothered him to death, all while the victim was bound and gagged). This Court considers awareness of impending doom relevant in a finding of heinousness. *State v. Weary*, 03-3067, p. 24 (La. 4/24/06), 931 So.2d 297, 314 (sufficient evidence of heinousness where the victim was subjected to continuous vicious beatings as he was driven from place to place; witness testified that victim attempted to escape and that victim moaned throughout ordeal before ultimately succumbing to injuries incurred when defendant ran over him with victim's own car).

In the present case, the trial court instructed the jurors with the following limiting instruction: "In order for you to find the offense was committed in an especially heinous, atrocious, or cruel manner, there must exist evidence from which you can find beyond a reasonable doubt that there was torture or the pitiless unnecessary infliction of pain on the victim." With this guidance, the jurors were able to use their common sense and life experiences to assess the pain Mrs. Brinson experienced when she was stabbed repeatedly by defendant. The trial court's limiting instruction met the strictures of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and the jury was educated to the narrow construction to be given to the terms "heinous, atrocious, or cruel manner." Consequently, defendant fails to demonstrate prejudice to substantial rights so as to deprive him of a reliable sentencing determination.

To assess the sufficiency of the state's evidence in support of the aggravating circumstance of heinousness, the jury was guided by the testimony of Dr. Steven Coswell, the forensic pathologist who conducted the autopsy on Oneatha Brinson. Dr. Coswell began by giving the cause of death as multiple stabs wounds, followed by a detailed description of the number and severity of each of the stab wounds suffered by Mrs. Brinson. Dr. Coswell elaborated on four fatal stab wounds to her torso, one of which penetrated her breastbone, perforated the left atrium of her heart and perforated her aorta. The second wound punctured the right breast and further penetrated into her right lung. The third wound entered her chest through the diaphragm, penetrated five inches before hitting Mrs. Brinson's liver. The fourth stab wound to her torso, began at the middle of the left armpit, heading backwards into the abdomen, puncturing several loops of intestine, hitting her kidney, before coming to rest in the muscles of her back. Dr. Coswell described how Mrs. Brinson died:

> The sum total of these stab wounds is approximately a quart of blood within her chest and pericardial sac and a fair amount of bleeding into the soft tissue around the kidney, all of these being fairly well supplied with blood vessels. And basically that is Mrs. Brinson's mechanism of death is that she bled to death not only blood outside her body but also the blood inside her body.... Mrs. Brinson was not a very large woman, she was only about five foot three inches tall so her

> blood volume would be such that losing a quart or a liter of blood would be ... a little over a quarter of her blood volume, and that in itself would be sufficient to cause death.

Dr. Coswell further testified to multiple blunt force injuries Mrs. Brinson sustained, including a wound to her head that appeared to have been caused by a chain necklace she was wearing which penetrated her skull as a result of being slammed against her head through forceful contact with some stationery object such as the floor or a wall. Dr. Coswell opined that "[t]his is a pretty significant amount of force because ... there's enough force there to actually crush all the way down to the skull." Moreover, Dr. Coswell described the numerous defensive wounds Mrs. Brinson sustained. He informed the jury that defensive wounds occur "[t]ypically if two (2) people are fighting and one person is stabbing or cutting the other person, the person who is being cut or stabbed will try to ward off the knife or fend off the knife. This usually means throwing up arms and hands to try to block the knife.... we'll see cut marks or stab wounds on the back or the outside of the forearm and on the hands classically if somebody grabs a knife blade and the knife is pulled out from their hand or actually driven along the palm and you will get cut marks on the palm of the hand or on the area of the thumb." Dr. Coswell concluded his jury presentation by detailing the numerous areas of bruising/contusions evident on Mrs. Brinson's body, as well as numerous abrasions.

Furthermore, the jury could draw on defendant's own words as to the final agonizing moments of life Mrs. Brinson endured in evaluating the state's presentation of evidence to support the aggravating circumstance of heinousness. Defendant's taped custodial statement was played to the jury during the guilt phase of trial, at which time the state passed to each of the jurors, transcribed copies of the statement, as an aid. In his statement, defendant admitted to going to Mrs. Brinson's house in the late afternoon of September 29, 2000 under the pretext of securing a day when he could do yard work again for her, having once been hired by her, a week or so earlier. During their conversation, Mrs. Brinson asked defendant if he would like a cold drink. They went inside her kitchen together. In his statement, defendant claimed that Mrs. Brinson was the aggressor and pulled a knife on him, cutting him once on the arm. He claimed he disarmed her of the knife, and initially, defendant maintained that he only stabbed Mrs. Brinson one time, and then only because she lunged at him and impaled herself onto the knife blade. Defendant elaborated as the statement progressed, describing a violent struggle with Mrs. Brinson in which he slammed her into the wall. The detectives asked if after he stabbed Mrs. Brinson, was she still alive:

A: She was still alive.

Q: Was she saying anything?

A: She was moaning.

Q: Moaning? Alright what did you do?

A: I walked around.

* * *

Q: Was she still over there moaning and moving around?

A: Yes.

Q: Did you see blood on her and stuff?

A: No.

D: ... did you think about calling anybody to help her?

A: No.

* * *

Q: Okay, so you told us that uh when you stabbed her the second time that she was on the floor?

A: Yes she was on the floor.

Q: So she was already laying on the floor?

A: Right.

Q: Why did you stab her a second time ... she was already on the floor ... she was already down ... she was no threat to you at all ... why did you stab her the second time?

A: I don't know I just ...

Q: What was your feelings at that time ... were you mad or were you scared or what?

A: It was probably just being I was in a rage.

Q: You were in a rage? Do you think maybe in this rage you stabbed her more than that once?

A: Probably could.

Q: You said after that she was uh ... she was moving around on the floor moaning and that sort of thing?

A: Yes.

Q: Why wouldn't you have called the ambulance for her?

A: Well cause ...

Q: Cause you were mad at her?

A: Yes.

Q: And you really didn't give a shit what happened to her from then on?

A: No.

Q: Isn't that right?

A: That's right.

After stabbing Mrs. Brinson, defendant related that the victim fell to the floor, but at one point, "she sat back up like this here. I dropped the knife and I reached over on the table ... I got the glass and hit .. (pounding on table sound) ... her in the head with the glass."

After Mrs. Brinson was incapacitated, defendant described walking around her house looking for things to steal and found a TV/VCR combination, some bags of coins, and her car keys, items which he would later trade for crack cocaine.

Despite his claims of stabbing Mrs. Brinson only once, or maybe twice, the photographs and the coroner's testimony, as well as the autopsy protocol, reveal the victim was stabbed at least 10 times, with penetrating wounds as deep as five inches into her body, hitting vital organs at every turn. Nevertheless, the small, 85-year-old woman fought with all her might, a fact which defendant conceded in his statement. But her efforts were overcome by defendant's greater strength and callous indifference to her humanity. The evidence supports a finding of pitiless infliction of

unnecessary pain on a victim who retained a definite awareness of her impending doom. Clearly the jury believed that the 10 major stab wounds Mrs. Brinson received involved great pain that was sufficient to support a finding that the offense was committed in an especially heinous and cruel manner. La. C.Cr. P. art. 905.4(A)(7).

The facts of this case are not unlike others in which the Court has found no error in juries' determinations that the offense was committed in an especially heinous, atrocious or cruel manner. See *Manning*, 03-1982, pp. 6872, 885 So.2d at 110306 (Court found heinousness where defendant abducted 62-year-old victim, and forced her to drive him 17 miles to a remote spot where he severely beat her about the face and chest before slashing her neck, severing her airway; estimated 20 to 60 minutes to die); *State v. Legrand*, 02-1462 (La. 12/3/03), 864 So.2d 89 (victim stabbed over 25 times with a variety of weapons); *State v. Rault*, 445 So.2d 1203, 1219 (La. 1984) (victim was raped, strangled, stabbed in the neck and shot twice; Court specifically notes victim's intense mental, as well as physical, pain during the ordeal); *State v. Flowers*, 441 So.2d 707, 718 (La. 1983) (a 70-year-old widow was severely beaten, raped and strangled in her home); *State v. Willie*, 436 So.2d 553, 55657 (La. 1983) (victim was taken blindfolded and naked to a remote area where she was tied spread eagle, raped, and had her throat repeatedly slashed); *State v. Taylor*, 422 So.2d 109, 11718 (La. 1982) (victim stabbed over 20 times; slow manner of death); *State v. Moore*, 414 So.2d 340, 348 (La. 1982) (victim received

13 stab wounds and died slowly "with awareness of her impending death").

Nevertheless, even if this Court determines that facts of this murder do not support a finding of heinousness, this Court has held on numerous occasions that the failure of one or more statutory aggravating circumstances does not invalidate others, properly found, unless introduction of evidence in support of the invalid circumstance interjects an arbitrary factor into the proceedings. *State v. Wessinger*, 98-1234, p. 16 (La. 5/28/99), 736 So.2d 162, 192; *State v. Letulier*, 97-1360, p. 25 (La. 7/8/98), 750 So.2d 784, 799. Evidence of this aggravating circumstance did not interject an arbitrary factor into these proceedings because evidence of the manner in which the offense was committed and of the nature of the victim's injuries was relevant and properly admitted at trial. Furthermore, the remaining aggravating circumstance was more than amply supported, i.e., that the victim was over 65 years of age. La. C.Cr. P. art. 905.4(A)(10). Hence, no arbitrary factor was interjected into the proceedings. See *State v. Roy*, 681 So.2d 1230, 1242 (La. 1996). Consequently, this assignment lacks merit.

Victim's Age as Aggravating Factor

In this assignment of error, defendant urges that a statutory element or aggravating factor basing death eligibility on the victim's age is an arbitrary classification that violates equal protection. Defendant's challenge is based on this Court's

pronouncement in *State v. Bowie*, 003344, (La. 4/3/02), 813 So.2d 377, 395, which recognized that:

> This Court has never explicitly addressed the validity of the victim's age as a factor elevating a killing to first degree murder or as an aggravating circumstance supporting imposition of the death penalty." Consequently, defendant observes that absent a controlling ruling from this Court, the issue remains unresolved.

La. Const. art. I, § 3 provides that "[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of ... age." Equal protection guarantees require that state laws affect alike all persons or interests similarly situated, but differences in legislative treatment may validly be accorded persons or interests classified differently, provided there is shown a rational basis for differentiation which is reasonably related to a legitimate governmental purpose. U.S. Const. amend. XIV; La. Const. art. I § 3; *State v. Bell*, 377 So.2d 303, 305 (La. 1979). In *Manuel v. State*, 95-2189, pp. 45, (La. 7/2/96), 677 So.2d 116, 11920, this Court held that statutes classifying persons based on age are unconstitutional unless the classification "substantially furthers an appropriate governmental purpose." (emphasis in original). Age classification review applies the intermediate scrutiny standard adopted in *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094, 110708 (La. 1985). *Manuel*, 95-2189, at 17, 677 So.2d at 125.

Nevertheless, appellate counsel in the present case suggests that this Court apply strict scrutiny to resolve the issue because the differential treatment imposed by the application of La. C.Cr. P. art. 905.4(A)(10) is an arbitrary classification system in violation of defendant's rights under the Fifth, Fourteenth, and Eighth Amendments. But see *Styron v. Johnson*, 262 F.3d 438, 45253 (5th Cir. 2001) (declining to apply strict scrutiny to an equal protection challenge brought by capital murder defendant sentenced to death on the basis of the Texas aggravating circumstance of murdering a child under the age of six years; rational basis analysis applied). There the Fifth Circuit opined: "'[A]ge is not a suspect classification under the Equal Protection Clause. States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.'" *Id.* (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 8384, 120 S.Ct. 631, 646, 145 L.Ed.2d 522 (2000) (citations omitted)).

The United States Supreme Court requires that there be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (White, J., concurring); Cf., *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)(a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to

others found guilty of murder," to pass constitutional muster).

In the present case, although the state employed the short form indictment charging defendant generally with the first degree murder of Oneatha Brinson, the trial court's preliminary instructions to the jury at the commencement of the guilt phase advised that the indictment in this case is based on the killing of a human being (1) when the offender has the specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of an armed robbery; or (2) when the offender has the specific intent to kill or to inflict great bodily harm upon a victim who is under the age of 12 or 65 years of age or older. In addition, as grounds for seeking the death penalty, the state alleged three aggravating circumstances: 1) the offender was engaged in the perpetration or attempted perpetration of an armed robbery, first degree robbery, or simple robbery; 2) the victim was 65 years of age or older; 3) the offense was committed in an especially heinous, atrocious or cruel manner. La. C.Cr. P. art. 905.4(A)(1), (10), (7). The jury found the latter two of the three aggravating circumstances presented.

In *State v. Gradley*, 970641 (La. 5/19/98), 745 So.2d 1160 (unpub'd appx), this Court observed that "[t]he legislature has recognized that the very young and those over the age of sixty-five are more vulnerable and less able to defend themselves than members of other age groups." Although relegated to the unpublished appendix, presumably because the

aggravating circumstance of the age of the victim was not offered by the state in that case, Gradley held that the legislature may define crimes differently depending on the age of the victim, where, as here, it has a legitimate government interest in safeguarding the welfare of those more needful of protection.

The Louisiana capital sentencing scheme has sufficiently narrowed the definition of capital murder to a finite set of circumstances, LSAR.S. 14:30, and then only when "the jury finds beyond a reasonable doubt at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death shall be imposed." La. C.Cr. P. art. 905.3. Murdering a person over the age of 65 years is a sufficiently narrow statutory aggravating circumstance. La. C.Cr. P. art. 905.4(A)(10). The age classification in question is rationally related to a legitimate state interest of protecting a vulnerable population of Louisiana's citizens. Under these circumstances, no violation of the prohibition against cruel and unusual punishment is gleaned by punishing with death a defendant who brutally killed an 85yearold female. Defendant's arguments to the contrary lack merit.

The Improper Use of Victim Impact Testimony at the Penalty Phase of Defendant's Trial Interjected an Arbitrary Factor Into the Jury's Deliberations.

In this assignment of error, defendant claims that his death sentence is excessive, arbitrary, and capricious

in violation of his federal and state constitutional rights.

In the present case, the state filed pretrial notice of its intent to introduce victim-impact evidence pursuant to *State v. Bernard*, 608 So.2d 966 (La. 1992). Shortly thereafter, the state amended its notice to name witnesses, Ann Brinson Joslin, daughter of the victim; and Jerry Smith, co-worker of the victim. Attached to that notice, Joslin prepared a two-page summary of her sentiments on the loss of her mother. Here, appellate counsel complains that the testimony of Jerry Smith exceeded the bounds of admissible victim-impact testimony.

As an initial matter, defense counsel failed to object to any portion of Jerry Smith's testimony. Thus, technically, the issue was not properly preserved for appellate review. La. C.Cr. P. art. 841; *State v. Wessinger*, 98-1234, p. 20 (La. 5/28/99), 736 So.2d 162, 181 (scope of review in capital cases is limited to alleged errors that are contemporaneously objected to; revived the contemporaneous objection rule for the penalty phase as well as guilt phase of a capital trial). In any event, a review of Smith's testimony reveals no improper victim-impact testimony.

In Bernard, this Court held that the state may "introduce a limited amount of general evidence providing identity to the victim and a limited amount of general evidence demonstrating harm to the victim's survivors." *Bernard*, 608 So.2d at 972. In providing guidance for the proper introduction of

victim impact evidence, the Court instructed that the state may present evidence reasonably showing that the defendant "knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors...." Id. In addition, La. C.Cr. P. art. 905.2 provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates."

The testimony of Jerry Smith, including cross-examination, spanned approximately four pages of the penalty phase transcript. Smith testified that he had worked with the victim, Nita Brinson, for about 10 years in the startup phases of a museum dedicated to veterans at Selman Field. He described their "special relationship" in that she was responsible for raising funds and he focused on the repair and renovation of the building. "[I]t was her dream to build this museum at the airport.... So she got about trying to save the building [where] we are housing memorabilia from Selman Field, from General Chenault and the Flying Tigers and also Delta Airlines.... I was quite impressed with her, I believed in the vision and that's what we were about." Smith went on to recall that after the horrifying news of Nita's death, the $ 10,000 needed to finish the museum project came forth in the form of memorials to her from all over the United States, enabling the slated opening of November 11, 2000 to be maintained. Smith noted that:

> Nita had a deep love for the veterans. She said our school kids don't know anything about what happened back then. And it was her dream that we could bring the kids in.... You know, America almost lost our freedom when World War II started. People don't realize that. When we bring school kids through [the museum], they don't really know what happened, the rationing, the sacrifices that people at home had to make. And the thousands of men who died and women. And it was her desire and mine too and everybody else in this group to carry on this history and to tell our people how grateful we should be to all of our veterans.

At the heart of appellate counsel's complaint in this part is the state's juxtaposition of the worth of the life of the victim, a lover of veterans, a patriot, a pillar of the community, versus the life of defendant "a career criminal." Indeed, the state opened its penalty phase case-in-chief with the testimony of the Deputy Clerk of Court for Ouachita Parish who detailed defendant's criminal record for the jury. The next witness the state called was Jerry Smith, whose brief remarks are the subject of this portion of assignment of error, and finally, the state closed its case-in-chief with the testimony from the victim's daughter.

The juxtaposition argument was the inevitable offshoot after the legislature amended La. C.Cr. P. art. 905.2 to provide that a capital sentencing hearing shall focus the character and propensities not only of

the defendant but also of the victim. See 1999 La. Acts, No. 783, § 3, effective January 1, 2000. Consequently, the focus of the last 10-year period of the 85-year-old victim's life was centered not on raising a family or managing a thriving real estate career, both of which Nita Brinson had accomplished years earlier. Rather, the focus of her last decade of life was dedicated to starting a museum to educate the children of Ouachita Parish about the patriotism and heroism of its veterans, and to open their young eyes to the costs of war. That focus was what made this victim a unique person that Smith sought to portray in his victim-impact testimony.

Nothing in the testimony of Jerry Smith exceeded the permissible scope of La. C.Cr. P. art. 905.2 or *Bernard*, nor did it interject an arbitrary factor into the jury's sentencing determination. No relief is due here.

The Trial Court Improperly Restricted the Defense's Attempt to Elicit Testimony in Support of Mitigating Evidence.

Next, appellate counsel complains that the trial court cut off defense cross-examination of the victim's daughter, Ann Brinson Joslin, when counsel sought to equate her loss of her mother to the potential pain that defendant's family might experience in losing him to execution, in the following colloquy:

> Q: Do you think it's conceivable that other people might be hurt by the loss of a loved one also?

A: Of course, Mr. Scott, yes.

Q: Even if that person is not a pillar of the community and has been a bad person and has done some things wrong? Do you think it's still conceivable that his family ...

The prosecutor interrupted with an objection which the trial court promptly sustained, directing counsel to move on with an abrupt, "Next question."

The present scenario, in which counsel sought to invoke a "mercy" theme from the victim's daughter, is the reverse of that faced by the Court in *State v. Manning*, 03-1982 (La. 10/19/04), 885 So.2d 1044. There, the trial court sustained the state's objections to defense counsel questioning Manning's mother and sister if they wanted the jury to spare Manning's life. *Manning*, 03-1982 at 6162, 885 So.2d at 109800. Recalling *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (permissible victim-impact evidence does not include "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence...."), this Court held that the trial court erred in sustaining the state's objection which cut off an attempt at the witnesses' response, but that the error was harmless because the jury would have inferred that the family members would have expressed a preference for life if they had been permitted to answer. *Manning*, 03-1982 at 6162, 885 So.2d at 109800. The Court reasoned that in this situation:

> Concerns for an even playing field must yield to the defendant's constitutional right to present any relevant mitigation evidence. While the Eighth Amendment allows the State to present only a limited amount of victim impact evidence, carefully circumscribed in scope, "[u]nder the aegis of the Eighth Amendment [the Supreme Court has] given the broadest latitude to the defendant to introduce relevant mitigating circumstances reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury." *Payne*, 501 U.S. at 82627, 111 S.Ct. at 2609. Given the breadth of the defendant's Eighth Amendment right to present any and all relevant mitigating evidence, it would be a difficult rule of law to enforce that the defendant's family members may restate in exacting detail the extenuating circumstances in the defendant's background and yet not express their conclusion based on that evidence that the defendant should live despite the severity of his crime. Id.

In the present case, the trial judge gave the defense the broadest of free reign to query each of defendant's family members, as well as his friends who testified as mitigation witnesses, as to how they would be affected if defendant received the death penalty. Here, unlike in *Manning*, the judge permitted defendant's friends and family members to express freely the negative impact it would have on them and their family if

defendant were executed. However, the judge drew the line at counsel's attempt to place the victim's daughter into that same category. To the extent that the judge precluded counsel from asking the victim's daughter to speculate on how the defendant's family members would feel were the jury to return a verdict of death, the decision to sustain the state's objection was correct. The error was surely harmless under the standard articulated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See also *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1798, 100 L. Ed. 2d 284 (1988)(O'Connor, J.) (harmless-error analysis begins with the premise that the evidence admitted at trial is sufficient to support the verdict and asks whether the state can prove "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'")(quoting Chapman). In the end, an appellate court must satisfy itself that the jury's verdict in the particular case was surely un-attributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *State v. Sanders*, 930001, p. 25 (La. 11/30/94), 648 So.2d 1272, 1291.

At any rate, at the close of counsel's very brief cross-examination of Ann Joslin, he asked whether her mother (the victim) was "a devout Catholic ... a generous and merciful individual," to which Joslin replied, "I believe those would adequately describe her in that respect." So, through the back door, counsel delivered his "mercy" theme. No relief appears due under this portion of this argument.

Unconstitutionality of Death Penalty (*Ring v. Arizona*)

In this assignment of error, defendant asserts that the Louisiana death penalty statute is unconstitutional because it fails to require the jury to determine that death is the appropriate punishment "beyond a reasonable doubt." Citing *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), defendant complains that Louisiana's capital sentencing scheme is based on "standardless jury discretion" which violates the Eighth and Fourteenth Amendments.

However, *Ring* requires that jurors find beyond a reasonable doubt all of the predicate facts which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. Id., 536 U.S. at 609, 122 S.Ct. at 2443. While defendant now argues that *Ring* should extend such a requirement to the ultimate sentence as well as the predicate facts, neither *Ring*, nor Louisiana jurisprudence for that matter, requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt. *State v. Koon*, 961208, p. 27 (La. 5/20/97), 704 So.2d 756, 77273 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.")(citation omitted). This argument lacks merit.

Capital Sentence Review

Under La. C.Cr. P. art. 905.9 and La.S.Ct.R. 28, this Court reviews every sentence of death imposed by Louisiana courts to determine if it is constitutionally excessive. In making this determination, the Court considers whether the jury imposed the sentence under the influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

The Department of Public Safety and Correction submitted a Capital Sentence Investigation Report ("CSIR"). See La.S.Ct.R. 28 § 3(b). The S[t]ate filed a Sentence Review Memorandum, and the defense filed a brief captioned, "Appellant's Response to the State's Sentencing Memorandum," which in fact was more akin to a supplemental to its original appellate brief.

Those documents, along with penalty phase testimony of defendant's relatives, indicate that defendant, Henry Joseph Anderson, is an African-American male, born on April 19, 1962, in Winnfield, Louisiana, to the marital union of Johnny Anderson, Jr. and Johnnie Gibson Anderson. Defendant has four brothers and two sisters, one half-brother and two half-sisters. Defendant was the third of these nine children, but the oldest child raised in the home, as his two older sisters lived in Winnfield with relatives. Two of

defendant's siblings had died of cancer by the time of his capital trial.

Defendant's father was a packer and manager at Action Moving and Storage, and subsequently owned his own moving company prior to his death from cancer in 1996. Defendant's mother was a homemaker, a substitute teacher, and worked part-time as a packer with the moving company. She died in her sleep in 2001 from a massive heart attack.

Defendant lived most of his life in Monroe, Louisiana, growing up in the Booker T. area. Defendant was educated in the Monroe City Schools. Defendant repeated the second grade twice, and the third, eighth, and tenth grades once, and readily admitted to skipping a lot of school. While defendant denied ever being expelled from school, he acknowledged various suspensions based on his unruly conduct. Defendant dropped out of Carroll High School in the eleventh grade at age 21, and obtained his GED in 1982.

Defendant's employment history is sporadic. After quitting school, he worked some for his father's moving company. He claimed that he was employed for a six-month period with Bountiful Foods when he was in a halfway house before being fired. Defendant further claimed that he worked at Tinsel-town for one month performing janitorial duties. At the time of the instant offense, defendant had performed yard work for Oneatha Brinson on one occasion, approximately a week before she died. Defendant admitted that he

basically relied on others for financial support, although he admitted to owing the IRS back taxes.

Defendant never served in the military. He never married and does not have any children.

As a child, defendant suffered from rheumatic fever and developed some heart problems as a result. He missed one year of school based upon his extended hospitalization therefor. Defendant admitted to using crack cocaine, and alcohol, although his reports varied as to the degree of use as to each. Defendant was found competent to proceed to trial, see Argument II, supra, but raised his mental retardation as an absolute bar to the death penalty. Ample evidence that defendant exaggerated his responses on his intellectual functioning and personality tests surely factored in the jury's unanimous determination that defendant is not mentally retarded.

According to the CSIR, defendant has no juvenile criminal record. However, as an adult, defendant attained fifth felony offender status. His rap sheet reflects a lengthy accumulation of felony arrests, most of which resulted in conviction:

> 1. On 4/11/84 defendant was arrested for attempted armed robbery of an army surplus store clerk using a small caliber handgun in West Monroe. Defendant became frightened and fled the premises after the clerk pushed an alarm button. He was sentenced to three years imprisonment at hard labor without

benefit of parole, probation, or suspension of sentence.

2. On October 11, 1989, defendant was arrested for theft between $ 50 to $ 200. The state amended the charge to attempted theft, defendant pled guilty and received a fine.

3. On July 26, 1990, defendant was arrested for unauthorized use of a movable. He pled guilty and received a suspended sentence and a fine.

4. On November 27, 1990, defendant was arrested for theft of a motor vehicle. He pled guilty and received a six-month sentence.

5. On October 14, 1991, defendant was arrested for simple burglary. He pled guilty to attempted simple burglary and was sentenced to four years imprisonment at hard labor.

6. On May 11, 1992, defendant was arrested for three counts of forgery. He pled guilty to attempted forgery and was sentenced to two years imprisonment at hard labor.

7. On March 19, 1996, defendant was arrested for simple burglary of an inhabited dwelling and illegal possession of stolen things. He pled guilty and was sentenced to six years imprisonment at hard labor.

> Defendant was on parole for these offenses at the time of the instant murder.

One month before defendant's arrest for murder, Caddo Parish issued a bench warrant for his arrest on the charge of felony theft. That warrant remained outstanding. Defendant was arrested on the instant charge of first degree murder on October 2, 2000. While incarcerated and awaiting trial, defendant was charged with battery on a police officer in an incident where defendant became belligerent and was ultimately subdued with pepper spray. These charges were dismissed in 2003.

Defendant did not testify at either the guilt or penalty phase of his capital trial. However, defendant made a recorded post-arrest statement at the Monroe Police Department, which was played to the jury at trial, and in which he admitted stabbing Oneatha Brinson to death and then taking personal property from her home, including her vehicle. The defense put forth various defense theories, including manslaughter, claiming that defendant was acting in a rage after Mrs. Brinson called him a "nigger;" self-defense, claiming that Mrs. Brinson first attacked him with the knife, after which he disarmed her and stabbed her; and finally, diminished capacity, based on his mental retardation.

The defense presented 10 witnesses at the penalty phase: a psychologist (Dr. Baker), a general physician (Dr. Wheeler), a school superintendent with Monroe City Schools, defendant's brother, his sister, two

halfsisters, and three family friends. On June 15, 2005, the court imposed the sentence of death, as unanimously recommended by the jury.

Passion, Prejudice, and Other Arbitrary Factors

The first degree murder of Oneatha Brinson occurred on September 29, 2000, and following jury selection, trial commenced on April 25, 2005, over four years after the crime was committed. Pretrial publicity was a factor during jury selection, and many potential jurors remembered the incident from news stories. However, no change of venue was requested.

The victim, Oneatha Brinson, was a Caucasian female, who was 85 years old at the time of her death. Defendant is an African-American male, who was 38 years old at the time of this offense. Defendant raised the issue of race beginning with his custodial statement to members of the Monroe Police Department in which he claimed that he stabbed Mrs. Brinson after she said "you nigger you need to go on and do the yard." However, none of the police officers taking the statement believed that an 85yearold woman would initiate an attack by uttering such a disparaging statement to a much larger and stronger male. At any rate, later in the taped statement, defendant told the officers that he was not mad that she had used the "n" word, and indicating that he does not get affected by "stuff like that." However, a crime scene photograph of the victim's bedroom depicts various framed photographs of her cherished ones on her dresser, and one of the photos appears to be that

of an African-American female, suggesting that Mrs. Brinson did not make that racial slur. Defendant's jury was composed of three African-American jurors, and nine Caucasian jurors. Defendant argued that African-Americans were excluded from his jury in violation of *Batson v. Kentucky*, supra. The trial court found no proof that a discriminatory intent tainted the state's exercise of its peremptory challenges. No prejudice is apparent.

For the first time in defendant's supplemental brief filed on July 24, 2007, appellate counsel reworked the "worth of the victim" claim from the original appellate brief, to claim for the first time that the state offered "subtle comparisons between the victim and the defendant" which reflected "racial and socioeconomic undertones that permeated the proceedings." A review of the portions of transcript in contention in this assignment of error shows absolutely no underlying racism. The race of the victim was never bantered about as one of her virtues, and defendant's race was never even mentioned apart from the responses of prospective jurors during voir dire. In all respects, defendant's capital trial appears to have been conducted free of any racial taint.

Aggravating Circumstances

The State relied on three aggravating circumstances under La. C.Cr. P. art. 905.4(A), and the jury returned the verdict of death, agreeing that two aggravating circumstances were supported by the evidence: (1) the victim was 65 years of age or older; and (2) the offense

was committed in an especially heinous, atrocious or cruel manner. La. Cr. P. art. 905.4(A)(10), (7); see *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Here, the State's evidence presented in the guilt phase, and reintroduced at the penalty phase, established that the brutal stabbing of Oneatha Brinson was a cruel and painful demise for the woman who had given this defendant an opportunity to earn an honest wage by cutting her grass. Defendant stabbed Mrs. Brinson at least 10 times, some wounds penetrating up to five inches deep, and left her to bleed to death on her kitchen floor while he repeatedly walked past her outstretched body as he carried away her possessions. The jury's finding of heinousness was fully supported by the evidence. Further, the State's evidence supported the jury's finding that Mrs. Brinson was 85 years old at the time of her death, well past the statutory threshold age of 65 required to capitalize the offense of murdering such a senior citizen. Consequently, defendant's sentence of death is firmly grounded on the finding of these two aggravating circumstances.

Proportionality

Although the federal Constitution does not require proportionality review, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d

692, 710 (La. 1990); *State v. Wille*, 559 So.2d 1321, 1341 (La. 1990); *State v. Thompson*, 516 So.2d 349, 357 (La. 1987). This Court, however, has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding in that one case, inter alia, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So.2d 1, 9 (La. 1979); see also *State v. Weiland*, 505 So.2d 702, 70710 (La. 1987) (in case reversed on other grounds, dictum suggesting that death penalty disproportionate).

This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier*, 380 So.2d at 7.

The State's Sentence Review Memorandum reveals that since 1976, jurors in the Fourth Judicial District Court (Ouachita and Morehouse Parishes) have recommended imposition of the death penalty six times, including defendant's case, five of which survived on direct appeal to finality. The State points out that during the period between January 1, 1976 to January 1, 1985, the policy of the district attorney in that district was not to seek the death penalty on any first degree murder case if the defendant would plead guilty and agree to a life sentence. Consequently, during that period, there was only one first degree murder case that originated in that district in which

the death penalty was sought. See *State v. Baldwin*, 388 So.2d 664 (La. 1980) (defendant convicted of first degree murder of an 85yearold female, and executed in 1984).

It is appropriate for this Court to look beyond the 4th JDC and conduct the proportionality review on a statewide basis. Cf. *State v. Davis*, 92-1623, pp. 3435 (La. 5/23/94), 637 So.2d 1012, 103031. This Court has observed that Louisiana juries appear especially prone to impose capital punishment for crimes committed in the home. See *State v. Holmes*, 06-2988, appeal presently pending in this Court; *State v. Coleman*, 06-0518, (La. 11/2/07), 970 So.2d 511 (conviction reversed and death sentence vacated by this Court on a Batson violation; remanded for new trial); *State v. Leger*, 05-0011 (La. 7/10/06), 936 So.2d 108; *State v. Bridgewater*, 00-1529 (La. 1/15/02), 823 So.2d 877; *State v. Jacobs*, 99-1659 (La. 6/29/01), 789 So.2d 1280; *State v. Howard*, 98-0064 (La. 4/23/99), 751 So.2d 783; *State v. Gradley*, 97-0641 (La. 5/19/98), 745 So.2d 1160; *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8; *State v. Code*, 627 So.2d 1373 (La. 1993); *State v. Burrell*, 561 So.2d 692 (La. 1990); *State v. Perry*, 502 So.2d 543 (La. 1986); *State v. Wingo*, 457 So.2d 1159 (La. 1984); *State v. Glass*, 455 So.2d 659 (La. 1984); *State v. Summit*, 454 So.2d 1100 (La. 1984); *State v. Williams*, 490 So.2d 255 (La. 1986). *Wingo* observed in this regard that "[t]he murder of a person by an intruder violating the sanctuary of the victim's own home [is] a particularly terrifying sort of crime to decent, law abiding people." *Id.*, 457 So.2d at 1170.

Finally, with respect to La. C.Cr. P. art. 905.4(A)(10) and LSAR.S. 14:30(A)(5) (victim over the age of 65), juries in Louisiana have readily returned the death sentence when the elderly are prayed upon as victims. See *State v. Draughn*, 05-1825 (La. 1/17/07), 950 So.2d 583; *Bridgewater, supra*; *Jacobs, supra*; *State v. Bowie*, 003344 (La. 4/3/02), 813 So.2d 377; *Howard, supra*; *Gradley; supra*; *Tart, supra*; *State v. Taylor*, 99-1311 (La. 1/17/01), 781 So.2d 1205; *Baldwin, supra.*

Compared to these cases, it cannot be said that the death sentence in this case is disproportionate. Nothing in any of the post trial documents filed pursuant to La.S.Ct.R. 28 warrants reversal of defendant's death sentence.

In conclusion, we find that despite defendant's efforts to claim mental retardation as a complete bar to capital punishment under *Atkins v. Virginia*, *supra.*, he does not meet Louisiana's definition because no symptoms of mental retardation manifested themselves by age 18. La. C.Cr. P. art. 905.5.1(H)(1). While defendant's IQ test revealed a full-scale score of 73, defendant could conceivably fall below the standard cutoff of 70 for intellectual functioning given a standard deviation. *State v. Williams*, 01-1650, pp. 2324, n.26 (La. 11/1/02), 831 So.2d 835, 85354. However, the record is replete with evidence, including by defendant's own mental retardation expert, that defendant's testing scores showed evidence of gross exaggeration. Similarly, La. C.Cr. P. art. 905.5.1(H)(2)(s), which provides that traumatic brain injury occurring after age 18 "does not

necessarily constitute mental retardation" gives defendant no shelter because no less than three experts concurred that defendant's 1994 concussion from a severe beating (at age 32) did not result in any long-lasting cognitive impairment, rendering moot defendant's Equal Protection challenge to La. C.Cr. P. art. 905.5.1 in which he claimed that it deprived him of his basic right to life by excluding him from exemption from the death penalty based solely on the age of onset of his symptoms of mental retardation. Consequently, the jury was justified in unanimously determining that defendant was not mentally retarded.

Otherwise, no reversible error is discerned at either phase of trial. The guilt phase evidence fully supports the jury's determination that defendant specifically intended to, and did kill an 85-year-old victim by stabbing her over 10 times, and that the killing occurred during the perpetration or attempted perpetration of an armed robbery. LSAR.S. 14:30(A)(1) and (5). During the penalty phase, the jury found two of the three aggravating circumstances urged by the state. The evidence supported the jury's finding that the victim was over the age of 65, La. C.Cr. P. art. 905.4(A)(10), and that the offense was committed in an especially heinous, atrocious or cruel manner. La. C.Cr. P. art. 905.4(A)(7).

DECREE

For the reasons assigned herein, the defendant's conviction and sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under La.C.Cr. P. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

AFFIRMED

APPENDIX B

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

HENRY JOSEPH ANDERSON,

2008 La. LEXIS 2496 (La., Oct. 31, 2008)

Rehearing Denied.